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Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

DONALD WEEMS AND MICHAEL BRIGGS,
Petitioners,

v.

LAWRENCE JOHNSON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

What are the minimal procedural due process protections required in "dangerousness" assessments of sex offenders where the assessments are material to the application of regulatory statutes against sex offenders?

LIST OF PARTIES

The parties below are:

Petitioners Donald Weems and Michael Briggs, individuals; and

Respondents Lawrence Johnson, et al. in His Official Capacity as Chief of Police, Little Rock Police Department; Little Rock Police Department; Daniel Moses, in His Official Capacity as Chief of Police, Pine Bluff Police; Paula Stitz, in Her Official Capacity as Chairperson of the Arkansas Sex Offenders Assessment Committee; Larry B. Norris, in His Official Capacity as Director, Arkansas Department of Correction; G. David Guntharp, in His Official Capacity as Director of Arkansas Department of Community Correction; and Sheri J. Flynn, in Her Official Capacity as Administrator of Sex Offender Screening and Risk Assessment.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

I. There is a split of authority regarding the requirements of procedural due process in assessing sex offenders: the Eighth Circuit's holding conflicts with several states and the Third Circuit 6

CONCLUSION 12

APPENDIX

APPENDIX A:

7/13/06 Circuit Court Opinion 1a

APPENDIX B:

11/30/04 District Court Memorandum Opinion and Order 19a

APPENDIX C:

Amendment Fourteen to the U.S. Constitution . . . 58a

ARK. CODE ANN. § 12-12-902 - Legislative findings 59a

ARK. CODE ANN. § 12-12-913. Disclosure 60a

ARK. CODE ANN. § 12-12-917. Evaluation protocol--examiners 65a

ARK. CODE ANN. § 12-12-922. Alternative procedure for sexually violent predator evaluations 73a

ARK. CODE ANN. § 5-14-128. Registered sex offenders prohibited from living near schools or day cares 77a

Sex and Child Offender Guidelines and Procedures, Code Ark. R. 004 00 002 at 8 (2002) (reproduced in part) 79a

Sex and Child Offender Guidelines and Procedures, Code Ark. R. 004 00 002 at 14 (2002) (reproduced in part) 80a

TABLE OF CITED AUTHORITIES

CASES

Connecticut Department of Safety v. Doe,
538 U.S. 1 (2003) 7, 10

Doe v. Pataki,
3 F. Supp. 2d 456 (S.D.N.Y. 1998) 9, 10, 11

Doe v. Poritz, 662 A.2d 367 (1995) 9

Doe v. Sex Offender Registry Bd.,
697 N.E.2d 512 (1998) 11

E.B. v. Verniero,
119 F.3d 1077 (3rd Cir. 1997) 11

Greenholtz v. Nebraska Penal & Correctional Complex,
442 U.S. 1 (1979) 7

State v. Guidry, 96 P.3d 242 (Haw. 2004) 7

In re W.M., 851 A.2d 431 (D.C. 2004) 11

J.J.F. v. State, 132 P.3d 170 (Wyo. 2006) 11

Jurek v. Texas, 428 U.S. 262 (1976) 7

Kansas v. Hendricks, 521 U.S. 346 (1997) 6

Monks v. New Jersey State Parole Bd.,
277 A.2d 193 (1971) 9

Noble v. Board of Parole and Post-Prison Supervision,
964 P.2d 990 (1998) 10

People v. David W.,
733 N.E.2d 206 (2000) 10, 11

People v. Ross,
646 N.Y.S.2d 249 (1996) 2

Rodriguez v. Rosenblatt,
277 A.2d 216 (1971) 9

Schall v. Martin, 467 U.S. 253 (1984) 6

State v. Kunz, 259 A.2d 895 (1969) 9

State v. Wingler, 135 A.2d 468 (1957) 9

STATUTES

28 U.S.C. § 1331 6

ARK. CODE ANN. § 5-14-128 . . . . . 2, 5, 7

ARK. CODE ANN. § 12-12-902 . . . . . 1, 7

ARK. CODE ANN. § 12-12-913 . . . . . 1, 4, 7

ARK. CODE ANN. § 12-12-917 . . . . . *passim*

ARK. CODE ANN. § 12-12-922 . . . . . 2, 8, 12

ARK. CODE ANN. § 25-15-201 8

ARK. CODE ANN. § 25-15-212 . . . . . 5, 8

ARK. CODE ANN. § 25-15-213 8

Sex and Child Offender Guidelines and Procedures, Code Ark. R. 004 00 002 (2002) 2, 4

OPINIONS BELOW

The ruling of the United States Court of Appeals for the Eighth Circuit dated July 13, 2006 affirming the District Court's decision to dismiss the plaintiffs' complaint is officially reported at 453 F.3d 1010 and is reproduced in App. A at 1a.

The decision and order of the United States District Court for the Eastern District of Arkansas dismissing plaintiffs' complaint was entered December 1, 2004. The decision is not reported in the official reporter and is reproduced in App. B at 19a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 13, 2006. Rehearing and rehearing en banc were denied on August 18, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13(3) because it is being filed within 90 days of the denial for rehearing as extended by Justice Alito on November 8, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the Fourteenth Amendment to the United States Constitution is set out in App. C at 58a.

ARK. CODE ANN. § 12-12-902 is set out in App. C at 59a.

ARK. CODE ANN. § 12-12-913 is set out in App. C at 60a.

ARK. CODE ANN. § 12-12-917 is set out in App. C at 65a.

ARK. CODE ANN. § 12-12-922 is set out in App. C at 73a.

ARK. CODE ANN. § 5-14-128 is set out in App. C at 77a

Page 8 of the *Sex and Child Offender Guidelines and Procedures*, Code Ark. R. 004 00 002 (2002) (reproduced in part), is set out in App. C at 79a.

Page 14 of the *Sex and Child Offender Guidelines and Procedures*, Code Ark. R. 004 00 002 (2002) (reproduced in part) ("*Guidelines*") is set out in App. C at 80a & 81a.

STATEMENT OF THE CASE

The State of Arkansas convicted Petitioner Donald Weems of exposure to a minor, a class A misdemeanor. After completing his sentence, Mr. Weems moved to Little Rock, established his residency, and properly registered as a convicted sex offender. The State assessed Mr. Weems as a Level 3 offender.[1]

After Mr. Weems's registration and assessment, Arkansas amended its sex offender law by forbidding Level 3 offenders from living within two thousand feet of a school or daycare center. *See* ARK. CODE ANN. § 5-14-128 (the "Registration Act"). Respondent Lawrence Johnson, the chief law

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[1] Every state in the union has some sort of sex offender registration and notification law. A list of citations can be found at *People v. Ross*, 646 N.Y.S.2d 249, 250 n.1 (1996). A significant portion of the states have some sort of system for assessing offenders' future dangerousness and then placing restrictions on offenders based on the assessment.

enforcement officer for Little Rock, enforced this law. Respondent Johnson sent Mr. Weems a letter ordering Mr. Weems to relocate from his established residence. Failure to relocate, said Respondent Johnson, would result in Mr. Weems being criminally prosecuted.

The State of Maryland convicted Petitioner Michael Briggs of first degree rape and sentenced him to two life terms plus fifteen years. However, Petitioner Briggs asked for — and the courts granted him — a hearing for post conviction relief. Prior to the hearing, the State of Maryland offered Mr. Briggs a reduced sentence in exchange for Mr. Briggs dropping his petition for post conviction relief. Mr. Briggs accepted the offer. The State of Maryland released Mr. Briggs on probation. Mr. Briggs then moved to Arkansas to live with his elderly mother.

After moving in with his mother, Mr. Briggs properly registered as a convicted sex offender. The State of Arkansas assessed Mr. Briggs as a Level 3 offender. Subsequently, Arkansas amended the Registration Act, forbidding Mr. Briggs from living within two thousand feet of a day care or school. Like Mr. Weems, Mr. Briggs had to relocate from his established residence or be criminally prosecuted.

Under the Sex Offender Registration Act of 1997 ("Registration Act"), codified at ARK. CODE ANN. § 12-12-901 *et seq.*, the State of Arkansas makes a case-by-case assessment of "the public risk posed" by an offender. ARK. CODE ANN. § 12-12-917(b)(1). Risk or dangerousness assessments are to be conducted on all persons required to register under the Registration Act. ARK. CODE ANN. § 12-12-917(b)(1)(A)-(B). The State assigns a level of risk based on its prediction of the offender's likelihood of engaging in future criminal activity. ARK. CODE ANN. § 12-12-

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913(c)(2)(A) and § 12-12-17(b)(1). Risk assessments are also to be reviewed when an offender is released from confinement in a correctional facility, prior to release after an acquittal on grounds of a mental disease or defect, at the start of a suspended imposition of sentence or at the start of probation. ARK. CODE ANN. § 12-12-917(e)(1)-(4).

By its assessment of a sex offender, Arkansas is publically predicting that the offender is a person likely to commit future crimes (low risk, moderate risk, high risk or sexually violent predator, depending on the assessment), and the government communicates its prediction to people throughout the community, including the offenders' neighbors. *Guidelines*, App. C at 80a-81a.

In making this assessment, State examiners consider "actuarial analyses, information obtained from interview, psychological testing and evaluation, review of relevant records and historical data, and [a] polygraph or penile plethysmograph." *Guidelines*, App. C at 79a. An offender is only entitled to access the "records and information generated and maintained by the [risk assessment] committee." ARK. CODE ANN. § 12-12-917(d)(2)(B)(ii). An offender may not see "restricted source documents of commercial psychological tests or working notes of staff," nor is the risk assessment committee required to show an offender "records and information generated by other agencies." ARK CODE ANN. § 12-12-917(d)(2)(A)(i)-(B)(ii).

In fact, an offender is only entitled to a list of the records and information obtained from other agencies by the risk assessment committee, not the records themselves. ARK. CODE ANN. § 12-12-917(d)(2)(B)(i)-(ii). Consequently, an offender's risk assessment may be conducted with information inaccessible to the offender.

The offender may appear before the risk assessment committee, but at that appearance the offender has limited rights. An offender may not have the assistance of counsel when meeting with the committee. An offender may not call witnesses. An offender may not confront the committee's witnesses. And an offender may not have the right to see all the documents relied upon by the committee. App. A at 16a; ARK. CODE ANN. § 12-12-917).

Although an offender may challenge the committee's finding in court, by that time the public notice has already been promulgated, and the after-the-fact judicial review is limited. The court can only reverse the committee's findings if they are "arbitrary and capricious" or otherwise unlawful. ARK. CODE ANN. § 25-15-212.

Subsequent to the enactment of the Registration Act, Arkansas passed ARK. CODE ANN. § 5-14-128. Under § 5-14-128, offenders assessed at Level 3 or 4 are forbidden from residing within two thousand feet of a school or day care, while offenders assessed at Level 1 or 2 face no residency restrictions.[2]

Believing that the Registration Act and its implementing regulations were unconstitutional violations of their liberty interests, Messrs. Weems and Briggs sued in federal court alleging, *inter alia*, violations of procedural due process. The

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[2] If a Level 3 or Level 4 offender owned the property prior to the establishment of the school or daycare or prior to July 13, 2003 (the effective date of the statute), then he is not in violation of the statute unless he is subsequently found guilty of another sex offense. ARK. CODE ANN. § 5-14-128(b) and (c). Neither Mr. Weems nor Mr. Briggs can enjoy this exception as Mr. Weems rented and Mr. Briggs lived with his mother.

jurisdiction of the District Court was asserted under 28 U.S.C. § 1331.

The Respondents moved to dismiss for failure to state a claim; the trial court granted the motion and entered a Memorandum Opinion and Order on December 1, 2004. Messrs. Weems and Briggs filed their notice of Appeal on January 3, 2005, and the Eighth Circuit entered its decision on July 13, 2006. Petitioners timely filed their Petition for Rehearing and Rehearing *En Banc* which the Eighth Circuit denied on August 18, 2006.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. There is a split of authority regarding the requirements of procedural due process in assessing sex offenders: the Eighth Circuit's holding conflicts with several states and the Third Circuit

This case presents this question: Under the U.S. Constitution,[3] what are the minimal procedural due process protections required in risk or dangerousness assessments of sex offenders where the assessments are material to the application of regulatory statutes against sex offenders?

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[3] Risk assessments of sex offenders are distinguishable from assessments made in other contexts in that sex offender assessments contemplate release from custody, community notification and residency restrictions *See e.g. Kansas v. Hendricks*, 521 U.S. 346 (1997) (involuntary civil commitments of violent sexual predators); *Schall v. Martin*, 467 U.S. 253 (1984) (juvenile pretrial detention);

The answer is uncertain as U.S. Constitutional due process requirements are different depending on the offender's jurisdiction.

Petitioners respectfully submit that federal constitutional jurisprudence should be consistent among the country's various jurisdictions, and for that reason this Court should grant certiorari to resolve the conflict.

Further, this Court seemed to anticipate the question presented here when it decided *Connecticut Department of Safety v. Doe*, 538 U.S. 1, 8 (2003) (implying that sex offenders could make a procedural due process challenge to registration and notification schemes if the facts to be established are material to the statutory scheme); *see State v. Guidry*, 96 P.3d 242, 251 (Haw. 2004) (commenting on the Court's decision in *Connecticut* that, "[l]ogically, then, it follows that due process would appear to require the opportunity to determine a fact that *is material* to a state's statutory scheme . . . .").

Under the Registration Act, the issue of a sex offender's risk or future dangerousness is material to the requirements to submit to an initial assessment, ARK. CODE ANN. § 12-12-902, and to the manner and scope at which community notification is conducted by the State, ARK. CODE ANN. § 12-12-913(c)(1)(A) - (2)(B)(iii). Moreover, a sex offender's future dangerousness is material to the places where he can reside in Arkansas. ARK. CODE ANN. § 5-14-128.

Greenholtz v. Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979) (parole board hearings); *Jurek v. Texas*, 428 U.S. 262 (1976) (sentence enhancements).

A. Basic procedural safeguards

1. According to the Eighth Circuit, it is constitutional for Arkansas to implement a system that denies offenders an attorney, confrontation of witnesses, or an opportunity to examine all the evidence against them.

There are no provisions within the Registration Act or the Sex Offender Guidelines and Procedures that allow a sex offender to be represented by an attorney, to confront witnesses, or to see all of the documentary evidence used in the initial assessment. App. A at 16a; Ark. Code Ann. (Sec) 12-12-917. Nor is he allowed such basic constitutional due process protections should he request an administrative review of the assessment. ARK. CODE ANN. § 12-12-922(b)(3)(B)(i)-(iii)[4].

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[4] In its decision the Eighth Circuit stated that the Registration Act gives "full procedural guarantees set forth in the Arkansas Administrative Procedure Act." App. A at 16a. This statement by the Eighth Circuit is incorrect. The procedural "guarantees" of the Registration Act are found at ARK. CODE ANN. § 12-12-917 ("Evaluation Protocol"). The Act's Evaluation Protocol is quite different than the Administrative Procedure Act's procedural guarantees found at ARK. CODE ANN. § 25-15-201 *et seq*. Indeed, unlike the Registration Act, Arkansas's Administrative Procedure Act requires that litigants be allowed to have counsel, confront witnesses, and receive copies of the evidence to be used against them. *Compare* ARK. CODE ANN. § 12-12-917 *with* ARK. CODE ANN. § 25-15-213. In the realm of sex offender registration, Arkansas's Administrative Procedure Act only comes into play when an offender wants judicial review of the risk assessment committee's findings, and in those circumstances the scope of the judicial review is limited. *See* ARK. CODE ANN. § 25-15-212.

Nevertheless, the Eighth Circuit found that the Arkansas Registration Act affords constitutionally required procedural due process. App. A at 13a & 16a-17a.

2. Other jurisdictions constitutionally require the protections that Arkansas denies

In *Doe v. Poritz*, 662 A.2d 367 (1995), the New Jersey Supreme Court considered a procedural due process challenge to New Jersey's sex offender registration and notification statutes. New Jersey's scheme provided for a three tiered notification system which was tied to an offender's alleged risk of re-offense. *Poritz*, 662 A.2d at 378.

Under *Poritz*, constitutional due process required a judicial hearing prior to tier two or three notification. *Poritz*, 142 N.J. at 106-07, 662 A.2d at 421. In reaching this holding, the *Poritz* court relied on several cases that held that "fundamental fairness" required a litigant to be able to have counsel and examine the evidence against him. *See Poritz*, 662 A.2d at 421-22 citing *State v. Wingler*, 135 A.2d 468 (1957) (affording defendant opportunity to see and respond to diagnostic report from Adult Diagnostic and Treatment Center); *State v. Kunz*, 259 A.2d 895 (1969) (mandating that defendants are entitled to inspect presentence report and to be heard on any adverse contents); *Monks v. New Jersey State Parole Bd.*, 277 A.2d 193 (1971) (holding that a prisoner is entitled to a statement of reasons for denial of parole); and *Rodriguez v. Rosenblatt*, 277 A.2d 216 (1971) (holding that an indigent municipal court defendant subject to imprisonment or other "consequence of magnitude" such as loss of driving privilege is entitled to court-appointed counsel at no cost).

Doe v. Pataki, 3 F. Supp. 2d 456 (S.D.N.Y. 1998), enumerated the minimal due process rights that should be

afforded to sex offenders facing a "dangerousness" assessment. These rights included representation by counsel, prehearing discovery, and proof by the State of the facts supporting each risk factor by clear and convincing evidence. *See Doe v. Pataki*, 3 F. Supp. 2d at 470-71. New York adopted the *Doe v. Pataki* holding. *See, e.g., People v. David W.*, 733 N.E.2d 206 (2000).

The Oregon Supreme Court held that "due process requires notice and an evidentiary hearing" before the state declares a person to be a "predatory sex offender." *Noble v. Board of Parole and Post-Prison Supervision*, 964 P.2d 990 (1998).

Arkansas's assessment of a sex offender's future dangerousness is material under the Registration Act. The results of the assessment affect community notification and the offender's place of residence. Therefore, as intimated by this Court's decision in *Connecticut Department of Safety v. Doe*, the Petitioners should have been afforded a meaningful opportunity to challenge or rebut the presumption and prediction of future dangerousness created under the Act. They have been and are being denied this opportunity by the State of Arkansas and by the decision of the Eighth Circuit. Furthermore, the decisions of the lower courts in this case are in conflict with the cases cited above in regard to the adequacy of the procedures used to assess sex offenders.

Consequently, there is a genuine and urgent need for this Court to grant Certiorari to decide what process is due to a sex offender where a dangerousness assessment is material to the application of a regulatory scheme against the offender.

B. Burden of Proof / Burden of Persuasion

Prior to the Eighth Circuit's decision below, in the context of sex offender registration and notification laws, the burden of proof issue was divided into two camps: "preponderance" and "clear and convincing." All authorities agreed that the burden of persuasion was on the government.

1. State held to "preponderance of the evidence" standard

In the case of *Doe v. Sex Offender Registry Bd.*, 97 N.E.2d 512, 520 (1998), the Massachusetts Supreme Court held that the government had the burden of persuasion, and "preponderance of the evidence" was the level of proof necessary in a sex offender registration and notification scheme. The case of *J.J.F. v. State*, 132 P.3d 170, 181 (Wyo. 2006), agrees. The Wyoming Supreme Court held that procedural due process under the U.S. Constitution required only "preponderance of the evidence" in Wyoming's sex offender registration and notification scheme. *See also In re W.M.*, 851 A.2d 431 (D.C. 2004) (same).

2. State held to "clear and convincing evidence" standard

In *E.B. v. Verniero*, 119 F.3d 1077, 1111 (3rd Cir. 1997), the Third Circuit held that constitutional due process required a hearing in which "the prosecutor has the burden of persuasion and must prove her case by clear and convincing evidence." A New York federal district court agrees with *E.B. v. Verniero*. *See Doe v. Pataki*, 3 F. Supp. 2d at 470-71 (S.D.N.Y. 1998). *Doe v. Pataki* has been cited with approval in New York state cases. *See, e.g., People v. David W.*, 733 N.E.2d 206 (2000).

3. *There is no standard articulated in the judgment below*

The Eighth Circuit's upholding of Arkansas's Registration Act has created a third camp. The Arkansas Registration Act and its regulations are silent as to level of proof must be shown in a risk assessment. Indeed, the Act is silent as to who (the offender or the State) initially has the burden of persuasion.[5]

Thus, certiorari is also appropriate here to settle this question: In sex offender registration and notification schemes, which standard of proof does procedural due process require? Is it "preponderance," "clear and convincing," or unspecified?

CONCLUSION

The writ of certiorari should be granted to give guidance to the federal courts as to the requirements of due process under the United States Constitution in sex offender regulatory statutes that mandate determinations of a sex offender's future dangerousness.

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[5] After the committee has assigned a risk level, the offender may challenge that determination. But in that challenge the burden of persuasion is on the **offender**. *See* ARK. CODE ANN. §§ 12-12-922(b); 12-12-917(g)(2)(B).

Respectfully Submitted,

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-1152

Donald Weems; Michael Briggs,	*	
	*	
Plaintiffs/Appellants,	*	
	*	
Tony Allen Lampkin,	*	
	*	
Plaintiff,	*	
	*	
v.	*	
	*	
Little Rock Police Department,	*	
	*	
Defendant,	*	
	*	Appeal from the
Lawrence Johnson, In his official	*	United States
capacity as Chief of Police, Little	*	District Court
Rock Police Department,	*	for the Eastern
	*	District of
Defendant/Appellee,	*	Arkansas
	*	
Pine Bluff Police Department,	*	
	*	
Defendant,	*	
	*	
Daniel Moses, In his official capacity	*	
as Chief of Police, Pine Bluff Police,	*	
	*	

Defendant/Appellee, *

*

Arkansas Department of Correction, *
Sex Offenders Assessment Committee *
and Sex Offender Screening and Risk *
Assessment, *

*

Defendant, *

*

Larry B. Norris, In his official *
capacity as Director, Arkansas *
Department of Correction; Paula *
Stitz, In her official capacity as *
Chairperson of the Arkansas Sex *
Offenders Assessment Committee; *
G. David Guntharp, In his official *
capacity as Director of Arkansas *
Department of Community Correction; *
Sheri Flynn, In her official *
capacity as administrator of Sex *
Offender Screening and Risk *
Assessment (originally sued as John *
Doe), *

*

Defendants/Appellees. *

Submitted: October 10, 2005
Filed: July 13, 2006

Before RILEY, HANSEN, and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

Donald Weems and Michael Briggs, registered sex offenders living in Arkansas, brought this action pursuant to 42 U.S.C. § 1983. They challenged provisions of the Arkansas Sex Offender Registration Act that require sex offenders to register with the State as well as a criminal statute that prohibits certain registered sex offenders from living within two thousand feet of a school or daycare center. The district court[1] granted defendants' motions to dismiss for failure to state a claim and denied plaintiffs' motion for class certification. We affirm.

I.

In 1997, the Arkansas General Assembly enacted the Sex & Child Offender Registration Act. The General Assembly determined that "sex offenders pose a high risk of reoffending after release from custody," that "protecting the public from sex offenders is a primary governmental interest," that "the privacy interest of persons adjudicated guilty of sex offenses is less important than the government's interest in public safety," and that "the release of certain information about sex offenders to criminal justice agencies and the general public will assist in protecting the public safety." Ark. Code Ann. § 12-12-902. The Act, now titled the Sex Offender Registration Act, *id.* § 12-12-901, requires registration by any person adjudicated guilty of, or serving a sentence for, a "sex offense" as defined in § 12-12-903(12); any person who has committed a sex offense but was institutionalized or acquitted on grounds of a mental disease; and any person previously required to register under the Habitual Child Sex Offender Registration Act. *Id.* § 12-12-905(a). A person who sustained

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[1] The Honorable Susan Webber Wright, Chief Judge, United States District Court for the Eastern District of Arkansas.

a conviction for a sex offense in another State and subsequently moved to Arkansas is likewise required to register. *Id.* § 12-12-906(a)(2)(A). Sex offenders required to register must provide name and address, employment information, a statement of the crime or crimes committed, and other demographic data. *Id.* § 12-12-908(b).

In 1999, the legislature amended the Sex Offender Registration Act to provide for the establishment of a Sex Offender Assessment Committee, a committee appointed by the governor and charged with "promulgat[ing] guidelines and procedures for the disclosure of relevant and necessary information regarding sex offenders to the public." *Id.* § 12-12-913(c)(1)(A); *see id.* § 12-12-921. The guidelines and procedures are to regulate the scope of information disclosed to the community, depending upon the sex offender's level of dangerousness, the sex offender's pattern of offending behavior, and the extent to which the information will enhance community safety. *Id.* § 12-12-913(c)(2)(B).

The 1999 Amendments also require sex offenders to undergo a risk assessment designed to predict future risk that the offender will recidivate. The Committee is charged with identifying "factors relevant to a sex offender's future dangerousness and likelihood of reoffense or threat to the community." *Id.* § 12-12-913(c)(2)(A). The guidelines promulgated by the Committee define four levels of risk: low, moderate, high, and sexually violent predator. *The Sex Offender Guidelines & Procedures for Implementing Risk Assessment & Cmty. Notification Regarding Sex Offenders*, at 13-14 (hereafter "*Guidelines*"), *reprinted in* J.A. at 50-51. The Guidelines provide for broader disclosure of information to the public as the risk level increases. *Id.* at 19-21.

Examiners performing risk assessments for sex offenders consider "actuarial analyses, information obtained from interview, psychological testing and evaluation, review of relevant records and historical data, and [a] polygraph or penile plethysmograph." *Id.* at 9. Using information gathered from the assessment, examiners determine the applicable level of risk, with one exception. Ark. Code Ann. § 12-12-917(b)(1), (e). Examiners do not have authority to categorize sex offenders as Level 4, sexually violent predators. This categorization can be made only by the sentencing court, *id.* § 12-12-918, with the examiner's role limited to providing a report recommending to the court whether to categorize the offender as a sexually violent predator. *Id.* § 12-12-917(a)(1).

Offenders may challenge their assigned risk level by submitting a written request for administrative review. *Id.* § 12-12-922(b)(1)(A). Under this procedure, the offender may request copies of all documents generated by the examiners, a listing of all documents that may be available from other agencies, and a copy of the tape of the interview. *Id.* § 12-12-922(b)(1)(B). A member of the Committee is assigned to conduct the administrative review within 30 days of receiving a request for review. *Id.* § 12-12-922(b)(6)(A). The member may set aside the assigned risk level if it is not supported by substantial evidence, if the governing rules and procedures were not properly followed, or if there is new information that has a bearing on the risk that the sex offender poses to the community. *Id.* § 12-12-922(b)(3)(B). Until administrative review is completed, notification to the community of an offender's assigned risk status shall be made "only at the level immediately below the level upon which review has been requested." *Id.* § 12-12-922(b)(5). Community notification commences five calendar days after the Committee mails the finding of the administrative review to the offender. *Id.* § 12-12-922(7)(A)(i).

If the administrative review does not alter the assigned risk level, the sex offender has the right to file a petition for judicial review in an Arkansas circuit court, pursuant to the Arkansas Administrative Procedure Act. *Id.* § 12-12-922(b)(7)(A)(ii). The filing of a petition does not automatically stay community notification, but the reviewing court "may do so upon such terms as may be just." Ark. Code Ann. § 25-15-212(c). The Arkansas APA provides that the court may reverse or modify the decision of the Committee if it is in violation of constitutional or statutory provisions, in excess of the agency's statutory authority, made upon unlawful procedure, affected by other error or law, not supported by substantial evidence in the record, or arbitrary, capricious, or characterized by abuse of discretion. *Id.* § 25-15-212(h).

In 2003, the Arkansas General Assembly enacted a residency restriction for Level 3 "high risk" offenders and Level 4 "sexually violent predators." Offenders in these classes are not permitted "to reside within two thousand feet (2,000') of the property on which any public or private elementary or secondary school or daycare facility is located." Ark. Code Ann. § 5-14-128(a). The statute excludes from the residency restriction any Level 3 or 4 offender residing in a property he owned and occupied before the school or daycare center opened or before July 16, 2003. *Id.* § 5-14-128(b)(1), (c)(1). But if an offender who satisfies one of the exceptions commits another sexual offense either after July 16, 2003, or after a new school or daycare center opens, he is no longer exempt. *Id.* § 5-14-128(b)(2), (c)(2). A sex offender who is required to register and knowingly violates the residency restriction is guilty of a Class D felony. *Id.* § 5-14-128(d).

Weems was found guilty of indecent exposure in Pulaski County, Arkansas, on March 7, 2000. Indecent exposure is a sex offense that subjects Weems to the registration and assessment requirements, and an examiner assessed Weems as a Level 3, high risk offender. After serving a one-year prison term, Weems moved into housing in Little Rock in May 2001. Weems received a letter dated February 28,2004, from the Chief of Police in Little Rock, advising him that he was in violation of the 2000-foot residency restriction, and ordering him to relocate.

Briggs was found guilty of first-degree rape in Hartford County, Maryland, in 1986. In March 2001, after serving fifteen years of his sentence, Briggs moved into his mother's house, located in Pine Bluff, Arkansas, and established permanent residence there. Pursuant to the Registration Act, Briggs registered and underwent a risk assessment, after which he was assessed as a Level 3 risk. On April 8, 2004, Briggs received notice that by living in his mother's home, he was in violation of the residency restriction and was required to relocate.

Weems and Briggs challenge the constitutionality of both the Registration Act and the residency restriction. They alleged in the district court that the statutes violate the doctrines of substantive and procedural due process. They also asserted that the Registration Act and Guidelines are unconstitutionally vague, that the residency restriction violates their equal protection rights by treating property owners and Level 1 and 2 sex offenders differently than non-property owning Level 3 and 4 offenders, and that the residency restriction violates their substantive due process rights to reside with family members and to unrestricted interstate and intrastate travel. They further alleged that the residency restriction is an unconstitutional *ex post facto* law that

retroactively punishes sex offenders who committed their crimes before July 16, 2003.[2]

The district court granted the defendants' motion to dismiss for failure to state a claim. Although it found that the plaintiffs' interests in their reputation and privacy are substantial, the district court, applying *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), held that the Due Process Clause does not require the State to extend the rights to counsel and to confront witnesses to the risk assessment process, and that Arkansas provided sufficient procedures. The court also concluded that the Registration Act is not unconstitutionally vague, that the residency restriction does not violate the equal protection rights of non-property owning Level 3 and 4 sex offenders, that the Act and residency restriction do not violate sex offenders' substantive due process rights, and that the residency restriction does not violate the *Ex Post Facto* Clause.

II.

We recently considered several issues raised by Weems and Briggs in connection with an Iowa statute that imposed a residency restriction for certain sex offenders. *Doe v. Miller*, 405 F.3d 700 (8th Cir.), *cert. denied*, 126 S. Ct. 757 (2005). In *Miller*, as relevant here, we held that an Iowa statute that included a 2000-foot residency restriction did not violate the substantive due process rights or right to intrastate travel of sex offenders, and did not constitute an unconstitutional *ex post facto* law. The Iowa statute differed from the Arkansas

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[2] Weems and Briggs also asserted that the Registration Act was inconsistent with the Confrontation Clause of the Constitution. This contention is not raised on appeal.

law in two principal ways. The Iowa statute was narrower in that it applied only to offenders convicted of sex offenses against minors, while the Arkansas law applies to some sex offenses in which adults were victimized. The restrictions of the Iowa statute affected offenders more broadly, however, because they applied to every sex offender convicted of an enumerated offense, without any individualized assessment. As explained, the Arkansas statute provides for an administrative process to assign a risk level to each offender on a case-by-case basis. Despite these differences, the principles discussed in *Miller* are highly instructive with respect to several of the claims raised by Weems and Briggs in this case.

Like the sex offenders in *Miller*, Weems and Briggs assert that the Arkansas residency restriction violates their rights under the doctrine of substantive due process, because the statute, in their view, infringes on a constitutional right "to reside in a certain place, i.e., with family members." In *Miller*, we rejected a similar appeal to precedents involving "intimate human relationships," *see Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), and concluded that a comparable residency restriction did not implicate any fundamental right of the sex offenders that would require strict scrutiny of the statute. *Miller*, 405 F.3d at 709-10. We reasoned that because the statute did not "operate directly on the family relationship," *id.* at 710, the residency restriction did "not infringe upon a constitutional liberty interest relating to matters of marriage and family in a fashion that requires heightened scrutiny." *Id.* at 711; *accord State v. Seering*, 701 N.W.2d 655, 663-65 (Iowa 2005); *see also Bowen v. Gilliard*, 483 U.S. 587, 598-603 (1987); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

Our holding in *Miller* controls the level of scrutiny applicable to the Arkansas residency restriction. Because the residency restriction does not infringe upon a "fundamental right," we consider only whether the statute rationally advances some legitimate government purpose. *Miller*, 405 F.3d at 714. The Arkansas legislature undoubtedly has a legitimate interest in protecting children from the most dangerous sex offenders, *see Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003), and we believe that a residency restriction designed to reduce proximity between the most dangerous offenders and locations frequented by children is within the range of rational policy options available to a state legislature charged with protecting the health and welfare of its citizens. *Miller*, 405 F.3d at 714-16. Indeed, Weems and Briggs rest their substantive due process argument entirely on the proposition that strict scrutiny should apply. We therefore conclude that the Arkansas statute does not contravene the doctrine of substantive due process.

Appellants next contend that the residency restriction violates the Equal Protection Clause of the Fourteenth Amendment because it treats non-property owning Level 3 and 4 sex offenders differently from property owners or Level 1 and 2 offenders. They argue that the residency restriction interferes with a "fundamental right to acquire, enjoy, own and dispose of property," such that it is subject to strict scrutiny. The district court concluded that as long as the statute was rationally related to a legitimate state interest, the residency restriction did not deprive appellants of the equal protection of the laws.

We agree with the district court that the rational basis standard of review applies to this equal protection claim. The distinctions drawn by the Arkansas statute are not based on a suspect classification such as race or religion, *cf. Shelley v.*

Kraemer, 334 U.S. 1 (1948), and the statute does not implicate a "fundamental right" under equal protection jurisprudence, such as the right to vote. *Cf. Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-27 (1969). Outside of these two categories, rationality review governs statutory classifications based on property ownership. *See Nordlinger v. Hahn*, 505 U.S. 1, 10-11 (1992); *WMX Technologies, Inc. v. Gasconade County, Mo.*, 105 F.3d 1195, 1198-99 (8th Cir. 1997). For reasons previously discussed, we further agree with the district court that the residency restriction applied to high risk offenders and sexually violent predators is rationally related to the State's legitimate interest in protecting the safety of children. *See Miller*, 405 F.3d at 714-16.

Weems and Briggs also contend that the residency restriction infringes on a constitutional right to intrastate travel. We rejected an identical contention in *Miller*, where we held that even assuming such a right is recognized, it would not be implicated by a residency restriction for sex offenders. *Id.* at 713. We observed that the Iowa residency restriction did not "prevent a sex offender from entering or leaving any part of the State," and it did not "erect any actual barrier to intrastate movement." *Id.*

Appellants contend that the Arkansas law is more restrictive than the Iowa statute, because the Registration Act defines "residency" to include "place of employment, training, or education." Ark. Code Ann. § 12-12-903(10)(B). A sex offender must register if he "establishes residency" in Arkansas. Thus, if a sex offender lives in a neighboring State, but works or attends school in Arkansas, then the offender must comply with the Registration Act. This requirement serves the purpose of notifying the community that a sex offender is within a particular municipality or county on a regular basis.

The definition of "residency" for purposes of registration in section 12-12-903(10)(B), however, appears in a different chapter of the Arkansas Code than the residency restriction, and the definition does not by its terms apply to the criminal statute that makes it unlawful for a sex offender "to reside" within 2000 feet of a school or daycare facility. Ark. Code Ann. § 5-14-128(a). Chapter 5 does not define the term "reside," and we do not assume that the General Assembly and the Governor necessarily intended to apply the broad definition of "residency" when crafting a restriction on where a sex offender may "reside." There is no indication in this record that the State has moved to enforce the residency restriction to prohibit sex offenders from working or studying within 2000 feet of a school or daycare center, and we see no good reason to create more difficult constitutional questions by adopting a broad construction that the State itself eschews. We thus employ the normal rule that termsare given "their ordinary and usually accepted meaning," *Williams v. State*, 67 S.W.3d 548, 556 (Ark. 2002), and we construe "reside" to mean "to dwell permanently or continuously." *Webster's Third New International Dictionary* 1931 (2002). On this understanding, the residency restriction in Arkansas is no broader than the restriction at issue in *Miller*, and for the same reasons discussed there, we conclude that the Arkansas law does not infringe on a constitutional right to intrastate travel. 405 F.3d at 713.

Weems and Briggs also argue that the Arkansas residency restriction constitutes an unconstitutional *ex post facto* law as applied to offenders who sustained convictions prior to the enactment of the statute. We addressed this same argument in *Miller*, and concluded that Iowa's residency restriction was not so punitive in purpose or effect to negate the legislature's intent to create a civil, non-punitive regulatory scheme. 405 F.3d at 718-23; *accord Seering*, 701 N.W.2d at 667-69.

As with the Iowa law, we conclude that the Arkansas General Assembly intended to create a civil, non-punitive regulatory scheme when it enacted the residency restriction. The General Assembly first passed the Registration Act, finding specifically that "protecting the public from sex offenders is a primary governmental interest," and that the "release of certain information about sex offenders to criminal justice agencies and the general public will assist in protecting the public safety." Ark. Code Ann. § 12-12-902. The Supreme Court of Arkansas then held that the General Assembly's intent in enacting the Registration Act was to protect public safety, and not to punish sex offenders. *Kellar v. Fayetteville Police Dep't*, 5 S.W.3d 402, 407 (Ark. 1999). The residency restriction was enacted as part of a bill relating to sex offender registration, including amendments to the Registration Act, 2003 Ark. Acts 330, and it works in tandem with the registration requirement. By its terms, the residency restriction applies to certain offenders who are "required to register under the Sex Offender Registration Act," and who are classified as "high risk" or "sexually violent predators" under the Act and Guidelines. Ark. Code Ann. § 5-14-128(a). As in *Miller*, we believe that the available evidence leads most naturally to the inference that the residency restriction, like the registration requirements, were intended to protect the public safety, and that the purpose of the Arkansas General Assembly was regulatory and non-punitive. *See Miller*, 405 F.3d at 719.

In considering whether the Arkansas residency restriction is nonetheless so punitive in effect as to negate the legislature's intent to create a civil, non-punitive regulatory scheme, we believe that Arkansas law is on even stronger constitutional footing than the Iowa statute. Unlike the Iowa law, the Arkansas statutory plan calls for a particularized risk assessment of sex offenders, which increases the likelihood

that the residency restriction is not excessive in relation to the rational purpose of minimizing the risk of sex crimes against minors. This fine-tuning of the restriction addresses the principal concern of the dissenting judges who believed the Iowa statute violated the *Ex Post Facto* Clause. *Miller*, 405 F.3d at 725-26 (Melloy, J., concurring and dissenting); *Seering*, 701 N.W.2d at 672 (Wiggins, J., concurring in part anddissenting in part). Because the other factors in the *ex post facto* analysis here are comparable to those discussed in *Miller*, 405 F.3d at 719-21, and the "rational connection" of the residency restriction is even closer to a nonpunitive purpose, we conclude that the Arkansas statute is not an unconstitutional *ex post facto* law.

Finally, citing the distinctions among sex offenders based on the assessment of risk levels, Weems and Briggs raise a procedural due process challenge to theArkansas statute and guidelines. They contend that the risk assessment determination and the resulting notification to the community deprive them of a liberty interest without due process of law. Assuming for purposes of analysis that appellants have a constitutionally-protected liberty interest in avoiding the risk assessment and its consequences, either by virtue of the Fourteenth Amendment or by creation of state law, we conclude that the procedures established by Arkansas are adequate. Considering the private interest affected by the State's actions, the risk of erroneous determinations under current procedures and the probable value of any additional safeguards, and the State's interest in risk assessment and community notification, including the fiscal and administrative burdens of additional procedures, *see Mathews v. Eldridge*, 424 U.S. at 335, we hold that the existing procedures comport with theConstitution.

Before a team operating under the oversight of the Sex Offender Assessment Committee may assign a risk level to an offender, the team conducts a thorough review of official records and historical data, performs psychological testing and evaluation, undertakes actuarial analyses, and conducts a personal interview with the offender. The offender has an opportunity to be heard through the interview, and may access most records and information maintained by the committee. Ark. Code Ann. § 12-12-917(d)(2)(A). The examination team typically follows an actuarial prediction model based on objective criteria, but the Guidelines do permit "some flexibility" to account for "special circumstances" of a particular case that are not adequately considered in the model. These "overrides" and "departures" permit the examiners to increase or decrease the assigned level based on special circumstances. *Guidelines*, at 14-15. Any such adjustment must be "fully documented," and it is subject to review by the Sex Offender Assessment Committee. *Id.* at 15.

The State has a strong interest in protecting children from dangerous offenders through a process that is efficient and practical. While sex offenders have an interest in avoiding inaccurate community notification or an unwarranted residency restriction, the Guidelines do not permit notification of a "high risk" assessment, which triggers the residency restriction and may bring greater opprobrium than notification in accordance with Level 1 or 2 status, until after the conclusion of an administrative review.[3] Prior to this review,

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[3]The residency restriction applies to a sex offender after he "has been assessed" as a Level 3 or Level 4 offender. Ark. Code Ann. § 5-14-128(a). The statute is indefinite about when, in the course of the assessment process, an offender should be deemed "assessed." Because the applicability of the residency restriction is defined with reference to the requirements of the Registration Act,

the risk of erroneous deprivation is negligible. Although examiners believe that the offender is a "high risk," the community may be notified only that the offender presents a "moderate risk," and the offender's criminal record – which almost certainly implies at least some level of risk – is already a matter of public record. The administrative review then ensures that the sex offender's assessment is considered by both the examination team and the Sex Offender Review Committee before a Level 3 assessment is implemented.

Weems and Briggs complain primarily that the procedures do not afford the "rigors of an adversarial process," including a right to counsel and to confront witnesses against them, and that the risk assessment process includes "undefined and non-specific overrides and departures." We are not persuaded that these features make the process constitutionally inadequate. The Committee's assessment is designed to be thorough and complex, drawing on historical records, psychological evaluations, and actuarial techniques. Deviations from the actuarial prediction models are designed to be "used sparingly," only with the approval of "senior clinical staff," and are subject to review by the Sex Offender Assessment Committee. *Guidelines*, at 14-15. These "overrides" and "departures" are not necessarily unfavorable to an offender; they may either increase or decrease the risk level assigned. Given the difficulty of predicting human behavior and the

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we think the better reading is that the restriction does not take effect until community notification at Level 3 is authorized under the Registration Act. This interpretation is consistent with the State's representation to the district court that "there is nothing preventing a person appealing a level 3 assessment from residing near a school or daycare while . . . an appeal is pending." (State Def's Br. in Supp. of Mot. to Dismiss Am. Compl., at 14; J.A. at 364).

numerous variables that may influence a professional's predictive judgment in a particular case, we do not think the authority to vary from the actuarial models or the absence of a precise listing of circumstances that will justify a variance are unconstitutionally vague or otherwise inconsistent with -15-the tenets of procedural due process. Indeed, it is just as likely that the flexibility to consider individual circumstances in special cases, rather than to follow a rigid actuarial model in every case, actually *reduces* the risk of an erroneous deprivation.

Nor do we believe that a right to counsel or to confront witnesses at the initial assessment stage is constitutionally mandated. Given the focus of the process on psychological evaluations and clinical judgments, it is unlikely that those procedural mechanisms would appreciably reduce the risk of an erroneous determination, while they would entail rather significant fiscal and administrative burdens. *See Bohn v. County of Dakota*, 772 F.2d 1433, 1438-39 (8th Cir. 1985). The Registration Act does provide for an adversarial judicial review of the Committee's administrative review decision, with the full procedural guarantees set forth in the Arkansas Administrative Procedure Act. Ark Code Ann. §§ 12-12-922(b)(7)(A)(ii); 25-15-212(f), (g).

We recognize that under amendments to the Registration Act approved in April 2006, judicial review is not available until after community notification and the residency restriction have taken effect for offenders assessed at Level 3. 2006 Ark. Acts 1st Extraordinary Sess. 4. Nonetheless, the Due Process Clause does not require that all procedural protections be afforded prior to a deprivation, *see Parratt v. Taylor*, 451 U.S. 527, 540 (1981), and we believe that the combination of *ex ante* procedures (initial assessment and administrative review) and *ex post* procedures (judicial review) are sufficient

to satisfy the requirements of due process. *See Bohn*, 772 F.2d at 1438- 39. The offender is entitled to one layer of review before the Level 3 assessment is put into effect, and this administrative review by the Committee reduces the risk of erroneous determination by the examiners. The State has a strong interest in the protection of children from sex offenders who are likely to recidivate, and the delay in notification and residency restriction that would be required to await completion of judicial review thus impairs the State's legitimate interests. Under the flexible *Mathews* factors, we believe that the procedural avenues afforded by the Arkansas statutes are constitutionally adequate. The Arkansas statute and guidelines provide notice to sex offenders of the risk assessment process and give them a meaningful opportunity to be heard. The program adequately balances the substantial interests of the State in protecting children and the interests of the offenders in avoiding an erroneous risk assessment, while providing reasonable procedures designed to ensure an accurate classification. We hold that the statutes and guidelines are consistent with the Due Process Clause.

* * *

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

DONALD WEEMS and MICHAEL BRIGGS,	*	
	*	
Plaintiffs,	*	
	*	
vs.	*	No. 4:04CV 00514 SWW
	*	
LITTLE ROCK POLICE DEP'T, ET AL.,	*	
	*	
Defendants.	*	

Memorandum Opinion and Order

Plaintiffs[1] file this compliant on May 21, 2004, alleging that certain state statues relating to sex offenders violate the United States and Arkansas Constitutions. Along with their complaint, plaintiffs filed a motion for class action and a motion for preliminary injunction. At a hearing on the motion for preliminary injunction on May 27, 2004, the parties reached an understanding regarding the enforcement

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[1] Tony allen Lampkin was a named plaintiff but he died on or about August 1, 2004, and his name was stricken from the action. *See* docket entry 59.

of the challenged statute that concerns a residency restriction, pending resolution of the case on the merits. At the Court's direction, defendants filed responses to plaintiff' motion for preliminary injunction. Defendants also filed motions to dismiss to which plaintiffs responded; plaintiffs also filed an amended complaint.[2] In light of the amended complaint, defendants supplemented their motions to dismiss and plaintiffs responded to those supplemental motions. For the reasons stated below, the Court finds the motions to dismiss should be granted.

Background

In 1997, the Arkansas General Assembly passed the Sex and Child Offender Registration Act ("Registration Act").[3] The Registration Act, codified at Ark. Code Ann. §§ 12-12-901 - 922 (Repl. 2003), has been amended several times, most recently in 2003 by Ark. Act 21, which went into effect on June 3, 2004.[4] The Registration Act requires individuals convicted of various sex offenses to register with the State as sex offenders and to submit to an assessment for the purpose of being classified according to the risk they pose to the public. After registration and assessment, the public is given

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[2] In their amended complaint, plaintiffs state they are not seeking any further preliminary relief than that contained in the Agreed Order entered June 1, 2004. *See* docket entry 8. The Court thus finds plaintiffs' motion for injunctive relief (docket entry 2) is granted in part and denied in part as moot.

[3] The Act was amended in 2001 and deleted "and Child" following "Sex."

[4] References to the Registration Act will include the provisions of the statute as amended by Act 21.

notice that the individual is a sex offender. the extent of the public notification depends on the level of danger posed by an offender, which is indicated by his risk classification.

Upon being found guilty of a sex offense covered by the Registration Act, state sentencing courts are required to indicate in their judgments whether offenders are required to register. Ark. Code Ann. § 12-12-906(a)(1)(A). the Act requires the Arkansas Department of Correction ("ADC") and the Department of Community Correction ("DCC") to ensure that offenders under their supervision who are required to register do so. Ark. Code Ann. § 12-12-906(a)(1)(B) & (C). In addition, the Arkansas Department of Finance and Administration's Office of Driver Services is required to provide notice of the obligation to register in connection with the issuance of driver's licenses and identification cards. Ark. Code Ann. § 12-12-916. To register, offenders must fill out a form, providing such information as name, date of birth, address, driver's license number, social security number, place of employment, date of arrest, and offense of conviction. Ark. Code Ann. § 12-12-908. That information is then reported to the Arkansas Crime Information Center for entry in its records. Ark. Code Ann. § 12-12-907(a)(1) & (2).

Sex offenders are informed of their obligation to submit to an assessment when they are registering. Ark. Code Ann. § 12-12-906(c)(1)(A)(i). the assessments are performed by the Sex Offender Screening and Risk Assessment ("SOSRA"), a department within the ADC. Ark. Code Ann. § 12-12-1303. The Sex Offenders Assessment Committee ("SOAC") has oversight responsibility for the assessments, Ark. Code Ann. § 12-12-917(b), and has promulgated guidelines and procedures for the assessments pursuant to Ark. Code Ann. § 12-12-913(c). The guidelines "identify factors relevant to a sex offender's future dangerousness and likelihood of

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reoffense or threat to the community[,]" Ark. Code Ann. § 12-12-913(c)(2)(A), and "address the extent of the information to be disclosed and the scope of the community to whom disclosure shall be made as these factors relate to the: (i) Level of the offender's dangerousness; (ii) Sex offender's pattern of offending behavior; and (3) Need of community members for information to enhance their individual and collective safety." Ark. Code Ann. § 12-12-913(c)(2)(B).

The assessment involves: 1) a thorough review of official records pertaining to the sex offenses and other criminal history; 2) psychological tests as deemed necessary; 3) a face-to-face interview; and 4) any other methods that the assessment team deems necessary to accurately assess the offender's risk of re-offending. State Defs.' Br. in Supp. Mot. to Dismiss Am. Compl., Ex. F ("*Guidelines*") at 9. The Registration Act sets out the following non-exclusive list of records and documents to be made available for the assessment: police reports; statements of probable cause; pre-sentence investigations and reports; complete judgments and sentences; current classification referrals; criminal history summaries; ;violation and disciplinary reports; all psychological evaluations and psychiatric hospital reports; sex offender or sexually violent predator treatment program reports; juvenile court records; victim impact statements; investigation reports to the State's child abuse hotline; and statements of medical providers treating victims of sex offense indicating the extent of injury to the victim. Ark. Code Ann. § 12-12-917(c)(2) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)).

Based on the historical data and information obtained during the assessment, offenders are assigned to one of four risk levels to the general public. Level 1 is low risk; level is

moderate risk; level 3 is high risk; and level 4 is considered a sexually violent predator. *Guidelines* at 18. If an offender voluntarily terminates the assessment process, is shown by substantial evidence to be deceptive during the assessment process, or fails to report for assessment as required, he or she will be assigned the risk assessment level of 3. Ark. Code Ann. § 12-12-917(b)(4)(B)(ii)(a); *Guidelines* at 18.

Higher risk levels lead to more widespread notice to the public that the individual is a sex offender. *Guidelines* at 25-27. Offenders may request reassessment by SOSRA every five years after their initial assessment. Ark. Code Ann. § 12-12-917(h) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)); *Guidelines* at 3-4. Under certain circumstances, offenders may apply to the sentencing court for an order terminating the obligation to register fifteen (15) years after their release from incarceration or fifteen (15) years after they were placed on probation. Ark. Code Ann. § 12-12-919.

The information acquired during registration and the offender's risk level is sent to the appropriate law enforcement agency for the purpose of facilitating public notification. Ark. Code Ann. §§ 12-12-917(f) & -922(b)(4)(A) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)). An offender's failure to register, cooperate during the assessment process, or report subsequent changes of address, employment, education, or training constitutes a class D felony. Ark. Code Ann. § 12-12-904.

Subsequent to the determination of risk level, level 1, 2, and 3 offenders may request an administrative review of the assessment. the review is conducted by a member of the SOAC. Ark. Code Ann. §§ 12-12-917(g)(2)(A) & -922(b) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)); *Guidelines* at 3, 20,21. If SOAC receives a request for administrative

review, community notification may be made only at the level immediately below the assessment level that is the subject of the review. Ark. Code Ann. § 12-12-922(b)(5) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)). Act 21 (2nd Ex. Sess.)). SOAC may amend the offender's assessment level upon a finding that the rules and procedures were not followed during the assessment, that relevant information exists that was not available at the time of the assessment, or that the assessment was not supported by substantial evidence. Ark. Code Ann. § 12-12-922(b)(3)(B) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)).

Pursuant to Ark. Code Ann. § 12-12-922(7)(A)(ii) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)), once the administrative review is exhausted, offenders assessed at levels 1, 2, and 3 may appeal their assessment by filing a petition in an appropriate state circuit court pursuant to the Arkansas Administrative Procedure Act, which is codified at Ark. Code Ann. § 25-15-201 *et seq.*. SOAC then transmits the record to circuit court. ARK. CODE ANN. § 25-15-212(d)(1). The court confines the review to the record and conducts it without jury, except that testimony may be taken in cases of alleged irregularities in the procedure before SOAC not shown on the record. Ark. Code Ann. § 25-15-212(g). Upon request, the court will hear oral argument and receive written briefs. *id.* The court may affirm SOAC's decision or remand the case for further proceedings. Ark. Code Ann. § 25-15-212(h). If the substantial rights of the offender have been prejudiced, the court may reverse or modify the decision by ruling that SOAC's findings, inferences, conclusions, or decisions are: "(1) In violation of constitutional or statutory provisions; (2) In excess of the agency's statutory authority; (3) Made upon unlawful procedure; (4) Affected by other error or law; (5) Not supported by substantial evidence of record; or (6) Arbitrary,

capricious, or characterized by abuse of discretion." *Id.* Community notification continues at the level immediately below the level that is the subject of the appeal during the circuit court proceedings, but is made at the level approved by the circuit court once it makes its decision. Ark. Code Ann. § 12-12-922(b)(9) & (10) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)).

The sentencing court, not the SOSRA or SOAC, determines whether a person is designated as a level 4 offender. That determination can follow one of two tracks. The first begins when a prosecutor alleges in the felony information that a defendant is a sexually violent predator. Ark. Code Ann. § 12-12-918(a)(1). If the defendant is found guilty, the court enters an order directing an examiner qualified by SOAC to issue a report recommending whether the defendant should be classified as a sexually violent predator. Ark. Code Ann. § 12-12-918 (a)(2)(A). The report is forwarded to the prosecutor and defense attorney, but it is not admissible for purposes of sentencing. Ark. Code Ann. § 12-12-918(a)(2)(B) & (C). After sentencing, the court determines whether the defendant will be classified as a sexually violent predator. Ark. Code Ann. § 12-12-918(a(3).

The second track begins during an assessment of a person convicted of an applicable offense who was not alleged to be a sexually violent predator. In such cases, if the SOSRA finds evidence that the person meets the criteria for a sexually violent predator, then SOAC shall bring that information to the prosecutor's attention. Ark. Code Ann. § 12-12-918(c)(1). The prosecutor will then decide whether to petition the sentencing court for a finding that the person is a sexually violent predator. *Id.* Sentencing courts retain jurisdiction to determine whether a defendant is a sexually violent predator for one year after sentencing or for so long as the defendant

remains incarcerated for the sex offense. Ark. Code Ann. § 12-12-918(c)(2).

In the event of either the first or second track being followed, the defendant may appeal SOSRA's recommendation to SOAC. Ark. Code Ann. § 12-12-917(g)(2)(A) & -922(b) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)). The defendant may also appeal the sentencing court's decision to Arkansas' appellate courts.

Arkansas Code Annotated § 5-14-128 ("Residency Restriction") prohibits Level 3 and Level 4 sex offenders from residing within 2000 feet of a school or day care facility. Violation of the statute is a class D felony. Arkansas Code Annotated § 5-14-128(d). It is a defense if the sex offender owned and occupied his residence before the school or day care facility was established. Arkansas Code Annotated § 5-14-128(b)(1). It is also a defense if the sex offender resided on property he or she owned prior to July 16, 2000. Arkansas Code Annotated § 5-14-128(c)(1).

Plaintiffs were required to register as sex offenders, underwent sex offender screenings and risk assessments, and were assessed as level 3 offenders. Plaintiff Weems was charged and convicted of indecent exposure to a minor, a class A misdemeanor. He was sentenced to and served one year in prison. He was released in March 2001 and subsequently secured residency in a public housing facility located in Little Rock, Arkansas. On February 28, 2004, separate defendant Lawrence Johnson, Chief of the Little Rock Police Department, notified Weems that he was in violation of the Residency Restriction and ordered him to relocate. Plaintiff Briggs was convicted of 1st degree rape in Maryland and sentenced to two life terms plus fifteen years. After serving twelve and one-half years in Maryland, Briggs

obtained a hearing for post-conviction relief. Prior to the hearing, he was offered a 22-year sentence in exchange for dropping his request for post-conviction relief. Subsequently, Briggs was released on probation and allowed to relocate to Arkansas in 2001 to live with his mother in Pine Bluff. On April 8, 2004, separate defendant Daniel Moses, Chief of the Pine Bluff Police Department, notified Briggs he had thirty days to relocate or be in violation of the Residency Restriction.

Plaintiffs seek to represent a class of sex offenders who are required to register and be assessed under the Registration Act and the subclass of offenders who have been classified as level 3 or level 4 offenders under the Act and who are subject to the residency restriction contained in Act 330, § 3, Arkansas Act of 2003, codified at Arkansas Code Annotated § 5-14-128.

Discussion

Plaintiffs claim the Registration Act and the Residency Restriction violate the Constitutions of the United States and Arkansas. Defendants argue plaintiffs' allegations fail to state a claim for relief and their complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). they also assert that because there is a parallel challenge to the Registration Act pending in state court, the Court should abstain from exercising jurisdiction over this lawsuit.

1. Abstention

Defendants argue this Court should decline to exercise its jurisdiction in this case because there is a parallel state court proceeding. They point out that on June 12, 2003, plaintiffs' counsel filed a lawsuit in Pulaski County, Arkansas Circuit

Court, *Roe v. Arkansas Dep't of Corrections, et al.*, No. CV-2003-6565, challenging the constitutionality of the Registration Act. In that lawsuit, Roe seeks judicial review of a decision by the SOSRA to classify him as a level 3 sex offender. In December 2003, he filed an amended petition challenging the constitutionality of the Registration Act and asking the court to enjoin enforcement of the Act.

"The existence of jurisdiction usually compels its exercise. The Supreme Court has noted a 'virtually unflagging obligation' on the part of federal courts to exercise their jurisdiction." *Missouri ex rel. Nixon v. Prudential health Care Plan, Inc.*, 249 F.3d 949, 952 (8th Cir. 2001). The Supreme Court has, however, identified certain circumstances in which federal courts must abstain and refuse to decide cases that are properly within their jurisdiction. The two primary abstention doctrines are those set out in *R. R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941) and in *Younger v. Harris*, 401 U.S. (1971). *See Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471 (1977). In *Colorado River Conservation Dist. v. United States*, 424 U.S. 800 (1976), the Supreme Court recognized that under truly exceptional circumstances, federal courts may abstain out of deference to pending state court proceedings. The Supreme Court noted that "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." *Id.* at 818. Citing *Colorado River*, defendants assert the Court should abstain from exercising its jurisdiction in order to avoid duplicative litigation. In additions, separate defendant Moses argues the Court should abstain under the *Pullman* doctrine.

The "exceptional circumstances" test of *Colorado River*, as expanded by the Supreme Court in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp*, 460 U.S. 1 (1983), requires consideration of six factors: (1) the inconvenience of the federal forum; (2) the desirability of avoiding piecemeal litigation; (3) the order in which jurisdiction was obtained by the courts; (4) the source of the governing law; (5) the adequacy of the state court action to protect the rights of the parties; and (6) the relative progress of the state and federal actions. *Darsie v. Avia Group Int'l, Inc.*, 36 F.3d 743, 745 (8th Cir. 1994) (citing *Colorado River* and *Cone*). The weighing of these factors is directed toward determining whether exceptional circumstances exist justifying the federal court's surrender of jurisdiction – not toward finding some substantial reason for the exercise of the federal court's jurisdiction. *Cone*, 460 U.S. at 25-26. The federal court must, however, remain mindful "that the balancing test is to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand." *Darsie*, 36 F.3d at 745 (internal quotation omitted). Thus, this Court must consider whether there exist exceptional circumstances justifying abstention in favor of the state court action.

"The Supreme Court cases make it clear that this [the desirability of avoiding piecemeal litigation] is the predominant factor." *Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coops., Inc.*, 48 F.3d 294, 297 (8th Cir. 1995) (citing *Cone*). Policies underlying *Colorado River* abstention include wise judicial administration, conservation of judicial resources, and comprehensive disposition of litigation. *Id.* at 298. The Eighth Circuit has stated: "Our cases have advanced this policy by favoring the most complete action." *Id. See, e.g., USF&G Co. v. Murphy Oil USA, Inc.*, 21 F.3d 259, 263 (8th Cir. 1994) (affirming stay of federal proceedings where state action, unlike federal action, included all parties

in a declaratory judgment action involving multiple insurers and overlapping coverage).

The Court notes that the state court proceeding addresses on the Registration Act while the action before this Court challenges the Residency Restriction as well. There is nothing to suggest that the federal forum is inconvenient, and while the state court action was filed in June 2003, almost a year before the federal complaint, this alone does not counsel in favor of abstention. *See Cone*, 460 U.S. at 21; *USF&G*, 21 F.3d at 263. Rather, it is more appropriately weighed in conjunction with the Court's analysis of the sixth factor – the relative progress of the state and federal actions. There are pending motions for summary judgment in the state action; there a pending motions to dismiss in the federal action. The Court finds the "source of the governing law" factor favors exercising jurisdiction and the "adequacy of the state forum to protect the rights of the parties" factor is neutral. The Court finds that the desirability of avoiding piecemeal litigation and considerations of wise judicial administration weigh in favor of this Court exercising its jurisdiction.

Separate defendant Moses cites the *Pullman* abstention doctrine to support his request for the Court to abstain from exercising its jurisdiction. Under *Pullman*, the Supreme Court acknowledged that federal courts may exercise their "wise discretion" to abstain from a case if a parallel state suit may resolve the federal question. 312 U.S. at 501. The Eighth Circuit has stated: "Pullman requires a federal court to refrain from exercising jurisdiction when the case involves a potentially controlling issue of state law that is unclear, and the decision of this issue by the state courts could avoid or materially alter the need for a decision on federal constitutional grounds." *Moe v. Brookings County, South Dakota*, 659 F.2d 880, 883 (8th Cir. 1981).

> The paradigm of the 'special circumstances' that make abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question. Abstention in such circumstances not only serves to minimize federal-state friction, but also avoids premature and perhaps unnecessary constitutional adjudication. But the doctrine of abstention 'contemplates that deference to state court adjudication only be made where the issue of state law is uncertain.' Where, on the other hand, it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to 'guard, enforce, and protect every right granted or secured by the constitution of the United States.'

Kusper v. Pontikes, 414 U.S. 51, 54-55 (1973) (citation omitted). Separate defendant Moses argues the state court's resolution of the constitutionality of the Registration Act may render plaintiffs' federal attack on the Residency Restriction moot and the state court may well interpret the Registration Act in such a way as to avoid or render unnecessary federal judicial review of the Act. The Court finds the present case does not fall within this category of abstention. The state law in question is not unclear nor is it fairly susceptible of an interpretation that would avoid the need for a decision on constitutional grounds. *See Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) ("[w]here there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim").

2. Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(6)

In deciding a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), all facts alleged in the complaint are assumed to be true. *Doe v. Northwest Bank Minn., N.A.*, 107 F.3d 1297, 1303-04 (8th Cir. 1997). The complaint must be reviewed in the light most favorable to the plaintiff, *McMorrow v. Little*, 109 F.3d 432, 434 (8th Cir. 1997), and should not be dismissed unless it is clear beyond doubt that the plaintiff can prove no set of facts thereunder which would entitle him or her to relief. *Hafley v. Lohman,* 90 F.3d 264, 266 (8th Cir. 1996). The Court may grant a motion to dismiss on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

A motion to dismiss is not a device for testing the truth of what is asserted or for determining whether the plaintiff has any evidence to back up what is in the complaint. *ACLU Foundation v. Barr*, 952 F.2d 457, 467 (D.C. Cir. 1991). The issue is not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims, irrespective of a judge's disbelief of a complaint's factual allegations or a judge's belief that the plaintiff cannot prove what the complaint asserts. *Id. See also Hickman v Tosco Corp.*, 840 F.2d 564, 565 (8th Cir. 1988); *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982). Thus, a motion to dismiss should be granted "as a practical matter . . . only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984))

a. Constitutionality of the Registration Act

Plaintiffs assert that the Registration Act violates their liberty interests "by the absence of due process at any stage through the implementation of a statutory and regulatory scheme that is unconstitutionally void for vagueness." Am. Compl., ¶ 18-19. They also claim the Registration Act violates their rights under the Sixth Amendment to confront witnesses against them and to a trial by jury.

Due Process

The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of their liberty without due process of law. Article II, § 8 of the Arkansas Constitution similarly provides that no person shall "be deprived of life, liberty or property, without due process of law [.]" The Arkansas Supreme Court interprets Art. II, § 8 consistently with the United States Supreme Court's Fourteenth Amendment jurisprudence. *See Long v. State*, 680 S.W.2d 686, 687 (Ark. 1984).

In *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), the Supreme Court held that where a person's good name or reputation is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. The Supreme Court subsequently interpreted *Constantineau* in *Paul v. Davis*, 424 U.S. 693 (1976), holding that mere injury to reputation does not constitute the deprivation of a liberty interest and "some more tangible interest such as employment" was necessary to trigger the requirement of due process. *See Bohn v. County of Dakota*, 772 F.2d 1433 (8th Cir. 1985) (reputations of parents identified as child abusers plus the privacy and autonomy of familial relationships were

protectible interests under the Fourteenth Amendment due process clause).

Plaintiffs recognize that in *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003), the Supreme Court held that a notification system that simply makes sex offender convictions available to the public is constitutional. They argue, however, that the Registration Act goes beyond mere community notification and subjects them to a process by which each is adjudicated to be at a risk level designed to represent his dangerousness to the community. They state the notification efforts are monumental and far exceed the statutory systems in states where active notification has been held to require due process; that raw police reports are included in the assessment; that the assessment system charges the offender with far greater opprobrium than the initial conviction; and that an assessment may result in residency restrictions. These added factors, plaintiffs argue, require that due process be provided to them prior to the risk assessment determination. Defendants assert that even assuming plaintiffs are deprived of a liberty interest as a result of the assessment, the Registration Act provides them with notice before the assessment and constitutionally sufficient procedural protections during and after it.

Plaintiffs do not appear to contend that the Registration Act does not provide sex offenders with sufficient notice. Their core argument seems to be that sex offenders are denied any meaningful opportunity to be heard regarding their initial risk assessment as well as any subsequent appeals. Plaintiffs point out that because they had an established risk level subsequent to August 1, 1997 and prior to June 3, 2004, they have no opportunity for an administrative review of their assessed risk level as Act 21 did not provide for reassessment of sex offenders prior to its going into effect. Additionally,

they say they have no administrative remedies available to them because they are beyond the deadlines for requesting an administrative and judicial review. Plaintiffs assert, however, that even if the amended statute applied retroactively, the statute deprives sex offenders like themselves the opportunity to confront testimonial evidence used by defendants in establishing their levels of risk, the right to an attorney, and other due process guarantees. They complain they have no right to the assistance of counsel at the interview with the SOSRA examiner and cannot confront the person or persons responsible for a whole range of documentary evidence being considered by the examiner. Plaintiffs complain that an administrative review is nothing more than a review of a defective procedure.

The concept of "'due process is flexible and calls for such procedural protections as the particular situation demands.'" *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471 (1972)). "Due process requires adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Marler v. Missouri State Bd. of Optometry*, 102 F.3d 1453, 1456 (8th Cir. 1996) (internal quotation marks omitted)." The Supreme Court set forth a three-part balancing test for determining "when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." *Matthews*, 424 U.S. at 348. The Court must consider (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

Defendants argue the private interests of the sex offenders in not having information about themselves disseminated in their communities is slight. The information consists of the offender's name, aliases, date of birth, sex offense convictions, street name and block number of his or her residence, race and gender, date of his or her last address verification, photograph, and parole or probation office. Ark. Code Ann. § 12-12-913(j)(1)(A). They claim this information would be in the public realm even without community notification. Defendants assert the interests of level 3 and 4 sex offenders living near schools and daycare facilities is balanced against the public interest in protecting children. In the case of level 3 offenders, only level 2 community notification is made during the administrative appeal or appeal to the circuit court. Thus, there is nothing to prevent a person appealing from a level 3 assessment from residing near a school or daycare center while the appeal is pending.

Defendants assert there is no much risk of an erroneous deprivation of these interests through the procedures in place. They argue there are ample pre-community notification procedural protections in place to prevent offenders from being given an incorrect assessment level. In addition to the opportunity for a face-to-face interview with an SOSRA employee, the assessment process includes a review of the official records pertaining to the sex offenses and other criminal history, from police reports to psychiatric reports. Further, the assessment process includes any psychological tests or other methods that the assessment team deems necessary to accurately assess the offender's risk of re-offending. Defendants argue the probable value of additional pre-community notification procedures would be negligible.

Defendants assert the State's interest in notifying the community after assessment but before any administrative or

judicial appeal is compelling. They cite *Connecticut Dep't of Public Safety, supra,* 538 U.S. at 4, where the Supreme Court states: "'Sex offenders are a serious threat in this Nation.' "'[T]he victims of sex assault are most often juveniles,' and '[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault.'" Considering this risk, defendants argue the State should not be forced to wait until offenders have exhausted their administrative appeal to SOAC and a subsequent judicial appeal before notifying the community.

Considering the Registration Act in light of the balancing test set forth in *Matthews v. Eldridge,* the Court finds that plaintiffs' private interests are substantial. Community notification under the Act likely will affect their interests in reputation and privacy as well as their place of residence. The Court finds that the risk of an erroneous deprivation is slight. The assessment process and procedures in place give the offender the opportunity to review the information being used to establish his risk level and to seek administrative and judicial review. Plaintiffs argue they have no opportunity to confront testimonial evidence used by the State and should have the right to an attorney. In light of the Court's finding *infra* that the assessment process is a civil proceeding, and the State's compelling interest in notifying the community and protecting children, the Court finds that affording the right to counsel and to confront witnesses concerning evidence would be unduly burdensome.

Plaintiffs also allege that the Registration Act and the procedural guidelines are void for vagueness.

> A vague regulation violates the Constitution in two significant respects. Such a regulation or enactment

> fails, (1) to define the offense with sufficient definiteness that ordinary people can understand prohibited conduct; and (2) to establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner. In a facial vagueness challenge, an enactment reaching a substantial amount of constitutionally protected conduct may withstand constitutional scrutiny only if it incorporates a high level of definiteness. an enactment imposing criminal sanctions or implicating constitutionally protected rights demands more definiteness than one which regulates the economic behavior of businesses or the conduct of students in the school setting.

Woodis v. Westark Comty. College, 160 F.3d 435, 438 (8th Cir. 1998). Specifically, plaintiffs assert the Guidelines are void for vagueness because of certain language under the "Overrides and Departures" section.

The introductory paragraph contains the following statement: "The following overrides and departures represent the primary (but not exclusive) causes to modify the actuarial risk assessment." *Guidelines* at 18. The second paragraph dealing with "Overrides" states:

> If statements made by the offender during the interview, or *certain features of the psychological assessment,* or the *judgment of clinical staff,* or *relevant historical data* suggest higher risk than the actuarial model predicts, the offender may be assigned to a higher risk level.

Paragraph three states: "If the offense involved extreme physical injury, death, or *other heinous actions,* the offender should be assigned to the highest level of risk." *Guidelines*

at 19 (italics added). Plaintiffs argue there are no definitions and no "real" guidelines but merely a description of the assessment process and then "Overrides and Departures." Plaintiffs further point to the final page of the Guidelines which contains a Disclaimer stated in bold letters: **"There is no foolproof method of predicting human behavior."** *Guidelines* at 33.

Plaintiffs argue that the phrases noted above are just as vague or more so than the phrase "gang related activities" contained in a school regulation found void for vagueness in *Stephenson v. Davenport Comty. Sch. Dist.*, 110 F.3d 1303 (8th Cir. 1997). The school district's disciplinary regulations forbid gang related activities "such as display of 'colors,' symbols, signals, signs, etc. ..." The plaintiff was suspended and forced to remove a tattoo of a small cross. The court noted that rules made fo a school setting need not be as detailed as a criminal code which imposes criminal sanctions. On the other hand, the court said that because "the literal scope of the District regulation 'is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Id.* at 1308-09. In finding the regulation void for vagueness, the court held that a person of common intelligence would have to guess at the meaning of "gang related activities."

A state statute is presumed constitutional. Consequently, a party challenging the constitutionality of a state statute bears a heavy burden. *Estate of Branson v. O. F. Mossberg & Sons, Inc.*, 221 F.3d 1064, 1065 n. 4 (8th Cir. 2000). An agency's interpretation of a statute that it is charged with administering is entitled to considerable deference. *Groseclose v. Brown*, 809 F.2d 502, 505 (8th Cir. 1987)

(citing *Young v. Comty. Nutrition Inst.*, 476 U.S. 974 (1986)). In *Young*, the Supreme Court stated:

> '[I]f a statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

476 U.S. at 980.

Plaintiffs cannot establish that the state defendants' interpretation of the statute is clearly wrong. The language plaintiffs target in the Guidelines informs the offender that the process of predicting behavior is not simple, and that the assessment team has flexibility to include additional factors affecting the final determination of risk. This flexibility permits SOSRA to reach the most accurate prediction of future behavior for each offender, but, as the disclaimer states, it is not a foolproof process.

The Guidelines provide that the assessment of an adult offender's risk level will be based on actuarial analysis, information obtained from interviews, psychological testing and evaluation, review of relevant records and historical data, and polygraph or penile plethysmograph, if deemed necessary by the team conducting the evaluation. *Guidelines*, at 10. The flexibility provided in the risk assessment procedure by the Overrides and Departures takes into account special circumstances of a particular case.

The Registration Act grants SOSRA the authority to review documents from various public agencies which include but are not limited to: police reports; statements of probable

cause; presentence investigations and reports; complete judgments and sentences; current classification referrals; criminal history summaries; violation and disciplinary reports; all psychological evaluations and psychiatric hospital reports; sex offender or sexually violent predator treatment program reports; juvenile court records; victim impact statements; investigation reports to the state's child abuse hotline; and statements of medical providers treating victims of sex offense indicating the extent of injury to the victim. Ark. Code Ann. § 12-12-917(c)(2) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)). The availability of overrides and departures does not make the Act or the Guidelines unconstitutional.

Sixth Amendment

Plaintiffs claim the Registration Act is unconstitutional because it deprives them of their rights under the Sixth Amendment to confront the witnesses against them and to a trial by jury. The Sixth Amendment provides that defendants in criminal prosecutions "shall enjoy the right to a speedy and public trial . . . to be confronted by witnesses against him . . . and to have the Assistance of Counsel for his defence." The Fourteenth Amendment guarantees that these rights also apply to actions by state governments.

The provisions of the Registration Act are civil statutes, intended as a mechanism for law enforcement to use to protect the public from potentially dangerous people, specifically those individuals who have been convicted of certain sex crimes. Ark. Code Ann. § 12-12-902 (Repl. 2003). The General Assembly specifically noted that such public protection was "a primary governmental interest." *Id.*

The Registration Act requires that sex offenders be assessed to determine their likelihood of re-offending, or the

level of risk they pose to the public when released from custody. Ark. Code Ann. § 12-12-917(b)(1) (as amended by 2003 Ark. Act 21 92nd Ex. Sess.)). The assessment of sex offenders in Arkansas is an administrative process, not a criminal prosecution, and is part of a regulatory scheme to monitor convicted sex offenders. "[T]he applicability of Sixth Amendment protections to civil statutory proceedings . . . [is] determined not with reference to the particular sanction ultimately imposed, but rather by considering the proceeding's inherent nature, identified through recourse to 'statutory language, structure, and intent.'" *U.S. v. Certain Real Property and Premises*, 945 F.2d 29, 35 (2nd Cir. 1992) (citations omitted). In holding the Registration Act is not an *ex post facto* law, the Arkansas Supreme Court found the inherent nature of the assessment, registration, and notification procedures is civil and regulatory. *Keller v. Fayetteville Police Dep't*, 5 S.W.3d 402 (Ark. 1999). Because the Registration Act is a civil statutory scheme, the provisions of the Sixth Amendment do not apply.

Even if the provisions of assessment, registration, and notification constituted additional punishment for convictions for sex crimes, such classification would not trigger Sixth Amendment protections. Classification of civil proceedings as punitive subsequent to a conviction does not automatically transform those proceedings into criminal prosecutions with all the procedural safeguards required by the Constitution. *Certain Real Property*, 954 F.2d at 35. The provisions in the regulatory registration, assessment, and notification scheme impose no specific affirmative disability or restraint on convicted sex offenders in Arkansas. *Kellar*, 5 S.W.3d at 407. Because the statutes are regulatory, they iimpose no additional punishment on plaintiffs and cannot be considered punitive. As the registration statutes are not punitive, and

therefore the assessment process is not a criminal prosecution, the provisions of the Sixth Amendment are not applicable.

b. Constitutionality of Ark. Code Ann. § 5-14-128

Arkansas Code Annotated § 5-14-128(a) provides:

> It shall be unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Lever 4 offender to reside within two thousand feet (2000') of the property on which any public or private elementary or secondary school or daycare facility is located.

Subsections (b) and (c) provide defenses to a charge of violating this statute. Subsection (b) provides:

> (b)(1) It shall not be a violation of this section if the property on which the sex offender resides is owned and occupied by the offender and was purchased prior to the date on which the school or daycare center was established.
>
> (2) The exclusion in subsection (b)(1) of this section shall not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after the school or daycare center is established.

Ark. Code Ann. § 5-14-128 (b). The second defense states:

> (c)(1) It shall not be a violation of this section if the sex offender resides on the property he or she owns prior to July 16, 2003.

> (2) The exclusion in subsection (c)(1) of this section shall not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after July 16, 2003.

Ark. Code Ann. § 5-14-128(c).

In Counts III-VI of their amended complaint, plaintiffs complain the Residency Restriction is unconstitutional because it: (1) deprives sex offenders assigned a risk assessment at level 3 or level 4 of equal protection by imposing restrictions on their fundamental rights, which restrictions are not imposed on exempt property-owning sex offenders or on sex offenders assigned a risk assessment at level 1 or level 2; (2) restricts their fundamental liberty interests; (3) deprives them of fundamental liberty interests without sufficient notice and without any meaningful opportunity to be heard; and (4) is an ex post facto law. Am. Compl., ¶¶23-29.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. It directs that all similarly situated persons shall be treated alike but does not require things that are different to be treated the same. *Plyler v. Doe,* 457 U.S. 202, 216 (1982). When a classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class, equal protection analysis requires strict scrutiny of a legislative classification. *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 312-13 (1976). If a classification does not burden a fundamental right or target a suspect class, it will be upheld if it bears a rational relationship to a legitimate end.

Weiler v. Purkett, 137 F.3d 1047, 1051 (8th Cir. 1998) (en banc).

Pursuant to the Residency Restriction, property-owning level 3 and level 4 sex offenders are allowed to reside on their property if they occupied the property and had purchased it prior to the date on which the school or daycare facility was established, or if they resided on the property prior to July 16, 2003. Plaintiffs, non-property-owning level 3 and level 4 sex offenders, claim that the statute, which distinguishes between property-owning and non-property owning level 3 and level 4 sex offenders, implicates their fundamental personal right to acquire, enjoy, own, and dispose of property, thus triggering the strict scrutiny analysis. State defendants assert the rational-basis test applied when determining the constitutionality of a statutory classification based on property ownership. Relying on *Nordlinger v. Hahn,* 505 U.S. 1 (1992), state defendants argue that protecting property owners' reliance interest is a legitimate government purpose for a classification system based on property ownership.

The Court finds that the rational-basis review is appropriate here as the classification neither impermissibly interferes with the exercise of a fundamental right nor is drawn upon inherently suspect distinctions. "Under rational basis review, challenged statutory classifications are accorded a strong presumption of validity, which is overcome only if the party challenging them negates 'every conceivable basis which might support it.'" *Independent Charities of America v. State of Minnesota,* 82 F.3d 791, 797 (8th Cir. 1996)(citation omitted). "Legislative bodies are given broad latitude in their legislative determinations, 'and it is not the province of the courts to monitor the imputs into each legislative decision.' Similarly, 'the 'true' purpose of the ordinance, (i.e., the actual purpose that may have motivated

its proponents, assuming this can be known), is irrelevant for rational-basis analysis.'" *WMX Techs., Inc. v. Gasconade County, Mo.*, 105 F.3d 1195, 1201 (8th Cir. 1997)(citation omitted).

The Court acknowledges that no legitimate argument can be made that non-property-owning sex offenders pose a greater threat to children than property-owning sex offenders. The Court finds, however, that the Residency Restriction, when analyzed in the context of a land-use restriction, has a rational basis and can withstand plaintiffs' equal protection claim.

In an effort to create a safe environment for children, the State has determined that certain sex offenders will not be allowed to reside within 2000' feet of a school or daycare facility. The Residency Restriction recognizes, however, that some level 3 and level 4 sex offenders occupied property and had purchased it prior to the date on which the school or daycare facility was established, or resided on the property prior to July 16, 2003. Thus, the Residency Restriction defenses allow those offenders to remain in their residences. Although defendants do not make this analogy, the defenses set forth in the statute are similar to the accommodation made for non-conforming uses in the wake of zoning restrictions.

A non-conforming use is a use which, although it does not conform with existing zoning laws, existed lawfully prior to the enactment of the zoning laws. These uses are permitted to continue even though they are technically in violation of the current zoning law. Just as zoning laws grandfather many pre-existing undesirable uses, the defenses set forth in the Residency Restriction allow property-owning level 3 and level 4 sex offenders to continue to reside in their homes.

Courts generally presume legislation to be valid and will uphold it against an equal protection challenge of its classifications are rationally related to a legitimate governmental interest. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). The Residency Restriction is rationally related to the State's interest in providing a safe environment for children. While the statute does not prohibit all level 3 and level 4 sex offenders from residing in the areas sought to be protected, it does prohibit any more of those offenders from moving into the area, thus reducing the overall number and making the area safer.

State defendants assert that were the Court to find that the property-ownership defenses violate equal protection, those provisions are severable and the appropriate remedy would be to enjoin only the defenses, leaving the remainder of the statute intact. Under the Court's land-use analysis, if that were done and property-owning level 3 and level 4 sex offenders were not allowed to reside in their own homes, the State would be put in the position of having to pay those offenders compensation for the loss of use of their homes. A zoning ordinance cannot operate to divest a property owner of the right to use the property in the manner it was used before the zoning restriction was adopted. It is unreasonable to anticipate that the State could afford to buy out all level 3 and level 4 property-owning sex offenders residing in the restricted areas. On the other hand, a determination that the statute in its entirety is unconstitutional would result in no restriction on where level 3 and level 4 sex offenders may reside.

A legislature may legislate in small increments, taking "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 489

(1955). While recognizing that the defenses in § 5-14-128 hamper the State's effort to create a safe environment for children, the statute is a step toward that goal. In time, those property-owning sex offenders will die or sell their property, resulting in fewer residing in the areas to be protected. Also, the goal of the legislation is furthered by the fact that schools and daycare facilities will be able to determine where and how many level 3 and level 4 sex offenders reside in the area and know that no more of those offenders will be moving into the area.

In light of the above and in the context of an equal-protection claim arising from a land-use decision, the Court finds the Residency Restriction does not violate the Equal Protection Clause. *See Door Store, Inc. v. City of Tacoma,* No. 90-35213,1991 WL 181718, at *1 (9th Cir. Sept. 17, 1991) (allowing certain preexisting nonconforming uses to continue pursuant to a zoning scheme does not violate equal protection); *Merry Charters, LLC v. Town of Stonington,* ___ F. Supp. 2d ___, 2004 WL 2471524 (D.Conn. Oct. 27, 2004) (plaintiff not similarly situated to commercial tour boat company whose dock was a pre-existing nonconforming use that did not require special permit in order to operate).

Plaintiffs also claim the Residency Restriction denies level 3 and level 4 sex offenders equal protection by impermissibly impinging on their fundamental right to reside in the place of their choice. They assert that even under a rational relationship test, there is no rational basis for distinguishing between levels of sex offenders regarding residency restrictions if sex offenders pose any threat at all to pre-school or school-age children. State defendants argue plaintiffs do not have a fundamental right to reside in a certain place or to travel locally unimpeded by their previous crimes. Using the rational basis test, state defendants argue it is rational for the

Residency Restriction to apply to those sex offenders who are prone to have uncontrollable impulses.

"Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam). Plaintiffs assert the Residency Restriction violates their fundamental rights concerning familial associations.

A statutory classification that does not directly and substantially interfere with family living arrangements does not burden a fundamental right. *Lyng v. Castillo,* 477 U.S. 635, 638 (1986). In *Lyng,* the Supreme Court applied the rational-basis test when reviewing a federal statute that provided food stamps to households rather than individuals. The statute treated unrelated persons who lived together as a single household only if they customarily purchased food and prepared meals together. In contrast, it treated parents, children, and siblings who lived together as a single household, even if they did not purchase food and prepare meals together. As a result, families were treated worse than unrelated persons. In upholding the statute, the Supreme Court applied the rational basis test because the statute did not "directly and substantially" interfere with family living arrangements, even though some family members could conceivably choose to move in order to receive benefits as individuals. *Id.* at 638. In *Bowen v. Gilliard,* 483 U.S. 587, 598-603 (1987), the Supreme Court applied the rational-basis test when upholding a federal statute that used the income of all parents and siblings living in the home when determining eligibility for welfare benefits. The Court refused to apply

any form of heightened scrutiny, stating: "That some families may decide to modify their living arrangements in order to avoid the effect of the amendment, does not transform the amendment into an act whose design and direct effect are to 'intrud[e] on choices concerning family living arrangements.'" *Id.* at 601-02 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977)).

Section 5-14-128 does not purport to prohibit certain relatives from living together as a family. It does not prohibit plaintiffs from residing with whomever they wish. It merely prohibits them from living within 2000 feet of a school or daycare facility. Ark. Code Ann. § 5-14-128(a). In other words, the statute speaks in terms of geography, not familial relationships. It does not directly and substantially interfere with level 3 and level 4 sex offenders' ability to live with their families. Thus, the Court finds the rational-basis test is applicable when determining whether the statute violates plaintiffs' rights.

The General Assembly determined not to place all sex offenders into one category but instead to assign them to one of four groups or levels. The existence of sexual compulsions and an inability or difficulty controlling them are among the factors that distinguish level 3 and level 4 sex offenders from level 1 and level 2 offenders. Level 4 offenders, the most dangerous, are classified as "sexually violent predators." They "are individuals . . . who have sexual or violent compulsions that they lack the ability to control." *Guidelines* at 18. Level 3 offenders are likely to have sexual compulsions that "may be kept under control when relapse prevention plans are followed and treatment is continued." *Id.* "The offense patterns of these individuals reflect a relatively high probability of re-offense and/or a risk of substantial injury to victims should re-offense occur." *Id.* On

the other hand, by definition, there is no indication that level 1 and 2 offenders have uncontrollable sexual compulsions. *Id.*

It is the absence of uncontrollable sexual compulsions that makes level 1 and 2 offenders less dangerous to children. Thus, allowing level 1 and 2 sex offenders to reside within 2000 feet of schools and daycare facilities, while prohibiting level 3 and 4 offenders from doing the same, is rationally related to the legitimate government purpose of protecting children from the most dangerous sex offenders. Thus, the Court finds the Residency Restriction does not violate the equal protection rights of level 3 and level 4 sex offenders.

Substantive Due Process

In Count IV of their complaint, plaintiffs claim the Residency Restriction impermissibly restricts their fundamental liberty interests. In particular, plaintiffs assert the statute interferes with their right to live with family members and their right to travel locally through public spaces and roadways.

> Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. There are two different ways of stating a substantive due process claim. First, the state violates substantive due process when it infringes "fundamental" liberty interests, without narrowly tailoring that interference to serve a compelling state interest. Second, the state violates substantive due process when it engages in conduct that is so outrageous that it shocks the conscience or otherwise

> offends 'judicial notions of fairness, [or is] offensive to human dignity.'

Weiler v. Purkett, 137 F.3d 1047, 1051 (8th Cir. 1998) (citations omitted). The first step in analyzing a substantive due process claim is to determine whether the strict-scrutiny test, the rational-basis test, or a test that lies somewhere in between is the appropriate standard of review. *See Washington v. Glucksberg*, 521 U.S. 702 (1997). Statutes are not reviewed under the strict-scrutiny test unless they disadvantage an inherently suspect class or impinge a fundamental right. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Sex offenders are not a suspect class. *See Wirsching v. Colorado*, 360 F.3d 1191 (10th Cir. 2004); *United States v. LeMay*, 260 F.3d 1018, 1030 (9th Cir. 2001); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *Artway v. Attorney General*, 81 F.3d 1235 (3rd Cir. 1966).

As discussed above, plaintiffs do not have a fundamental right to reside in a certain place. The Court further finds that plaintiffs do not have a fundamental right to travel locally unimpeded by their previous crimes.

> The very word 'travel' is not found in the Constitution, but the 'right to travel' as a fundamental right is firmly entrenched. The right is so important that it 'is assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.' The 'right' as discussed by the U.S. Supreme Court involves three different components: the right to travel from one state to another, the right to be treated as a welcome visitor and if residence changes, the right to be treated equally with citizens of the new home state.

Saenz v. Roe, 526 U.S. 489, 500 (1999). Plaintiffs do not assert that the statute impinges on the right to interstate travel. Rather, they contend the Constitution protects intrastate travel as a fundamental right.

In *Johnson v. Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002), the court considered the constitutionality of a city ordinance that banned persons convicted of drug crimes from entering 'drug exclusion zones." The court held that the Constitution "protects a right to travel locally through public spaces and roadways." Relying on this decision, the court in *Doe v. Miller,* 298 F. Supp. 844 (S.D. Iowa 2004), found that a state statute prohibiting sex offenders from residing within 2000 feet of a school or child care facility infringed on the plaintiffs' fundamental right to interstate and intrastate travel. Plaintiffs here assert the Residency Restriction limits their ability to move freely through the public spaces and roadways of Arkansas, including their right to remain in the public place of their choice. They also claim it limits their choices of employment, training and/or education.

The Residency Restriction restricts only where a sex offender can live, not where he can work or travel. It does not impact on a sex offender's right to intrastate travel. The Iowa statute at issue in *Doe* prohibited sex offenders from residing within 2000 feet of schools and day care facilities. It defines "residence" as "the place where a person sleeps, which may be more than one location, and may be mobile or transitory." *Doe*, 298 F. Supp. at 875. Thus, the court in *Doe* held that the Iowa statute impacted the right to intrastate travel because it effectively prohibited a sex offender who was passing through from stopping for the night at a hotel within 2000 feet of a school. *Id.* Unlike the Iowa statute, § 5-14-128 does not define "residence" as anyplace where a sex offender happens to spend the night. The Court is unaware of

any Supreme Court or Eighth Circuit Court of Appeals case holding there is a fundamental right to intrastate travel. In addition, the Court finds the Residency Restriction does not restrict plaintiffs' right to intrastate travel.

Procedural Due Process

In Count V of their amended complaint, plaintiffs claim the Residency Restriction impermissibly deprives them of fundamental liberty interests without sufficient notice and without any meaningful opportunity to be heard.

There is no dispute that Ark. Code Ann. § 5-14-128 is a criminal statute. As such, if plaintiffs are ever charged with violating it, they would have the right to all the protections associated with a criminal jury trial. Plaintiffs repeat their contention that the Act does not provide any procedure for an individual risk assessment of an offender who was released prior to the Act's effective date. In other words, the restrictions apply to all level 3 and level 4 offenders regardless of whether their pre-release assessment occurred five years or one day before the effective date of the Act. They further complaint that the restrictions are placed on plaintiffs without any showing that they pose a risk to pre-school or school age children.

The Court previously discussed the procedural protections contained in the Registration Act, and found those protections satisfy the procedural due process requirements of the federal and state constitutions.

Ex Post Facto

Lastly, plaintiffs complain that the enactment, implementation, and application of the Residency Restriction

violates the *Ex Post Facto* clauses of the United States and Arkansas constitutions.

The United States Constitution prohibits states from enacting laws with certain retroactive effects. U.S. Const. art. I, § 10, cl. 1. *Strogner v. California,* ___ U.S. ___, 123 S.Ct. 2446 (2003). In *Calder v. Bull,* 3 Dall. 387 (1798), Justice Chase divided *ex post facto* laws into categories that he described in two alternative ways. He wrote:

> 'I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd *Every law that aggravates a crime, or makes it greater than it was, when committed.* 3rd Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th *Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.* All these, and similar laws, are manifestly unjust and oppressive.'

Strogner, supra, 123 S.Ct. at 2450 (quoting *Calder v. Bull*). Plaintiffs contend that the Residency Restriction is the third type of *ex post facto* law in that it increases the punishment for their previous sex offenses. Thus, the issue is whether the statute punishes plaintiffs for sex offenses committed before the statute went into effect on July 16, 2003.

Section 5-14-128 makes it a criminal offense for a level 3 or level 4 sex offender to reside within 2000 feet of a school or day care facility. It does not punish an offender for

previous sex offenses; it merely prohibits an offender from residing within the protected zone after the effective date. *In United States v. Pfeifer*, 371 F.3d 430, 436 (8th Cir. 2004), the court considered whether the felon-in-possession statute violated the *ex post facto* clause because it effectively increased the punishment for a crime committed 17 years earlier. The court found "the critical factor . . . is that the prohibited conduct - possession of a firearm - occurred after enactment of the statute." *See also United States v. Farmer*, 73 F.3d 836, 841 (8th Cir. 1996) (rejecting argument that three-strikes statute increased punishment for crimes committed before its enactment).

The conduct to which the criminal penalty attaches is not the conviction which occurred prior to the enactment but the act of establishing an illegal residence subsequent to the effective date of the statute. The Court thus finds the Residency Restriction is not an *ex post facto* law.

Conclusion

IT IS THEREFORE ORDERED that defendants' motions to dismiss[5] are granted. Plaintiffs' claims are dismissed.[6] IT IS FURTHER ORDERED that the restrictions set forth in the Agreed Order of May 28, 2004, will remain in effect pending resolution of this case on appeal or until the time for filing an appeal has expired.

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[5] Docket entries 19, 26, 28, 44, 54, 56, and 57.

[6] Plaintiffs' motion to class action certification [docket entry 4] and second motion to amend complaint [docket entry 63] are denied.

DATED this 30th day of November, 2004.

/s/ Susan Webber Wright
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

Amendment Fourteen to the United States Constitution

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARK. CODE ANN. § 12-12-902 - Legislative findings

The General Assembly finds that sex offenders pose a high risk of reoffending after release from custody, that protecting the public from sex offenders is a primary governmental interest, that the private interest of persons adjudicated guilty of sex offenses is less important than the government's interest in public safety, and that the release of certain information about sex offenders to criminal justice agencies and the general public will assist in protecting the public safety

ARK. CODE ANN. § 12-12-913. Disclosure

(a)(1) Registration records maintained pursuant to this subchapter shall be open to any criminal justice agency in this state, the United States, or any other state.

(2) Registration records may also be open to government agencies authorized by law to conduct confidential background checks.

(b) In accordance with guidelines promulgated by the Sex Offenders Assessment Committee, local law enforcement agencies having jurisdiction shall disclose relevant and necessary information regarding sex offenders to the public when the disclosure of such information is necessary for public protection.

(c)(1)(A) The Sex Offenders Assessment Committee shall promulgate guidelines and procedures for the disclosure of relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection.

(B) In developing the guidelines and procedures, the Sex Offenders Assessment Committee shall consult with persons who, by experience or training, have a personal interest or professional expertise in law enforcement, crime prevention, victim advocacy, criminology, psychology, parole, public education, and community relations.

(2)(A) The guidelines and procedures shall identify factors relevant to a sex offender's future dangerousness and likelihood of reoffense or threat to the community.

(B) The guidelines and procedures shall also address the extent of the information to be disclosed and the scope of the community to whom disclosure shall be made as these factors relate to the:

(i) Level of the sex offender's dangerousness;

(ii) Sex offender's pattern of offending behavior; and

(iii) Need of community members for information to enhance their individual and collective safety.

(3) The Sex Offenders Assessment Committee shall submit the proposed guidelines and procedures to the House Committee on Public Health, Welfare, and Labor and the Senate Committee on Public Health, Welfare, and Labor for their review and shall report to the House Committee on Public Health, Welfare, and Labor and the Senate Committee on Public Health, Welfare, and Labor every six (6) months on the implementation of this section.

(d)(1) A local law enforcement agency having jurisdiction that decides to disclose information pursuant to this section shall make a good faith effort to notify the public and residents at least fourteen (14) days before a sex offender is released or placed into the community.

(2) If a change occurs in a sex offender's release plan, this notification provision shall not require an extension of the release date.

(3) In conjunction with the notice provided under § 12-12-914, the Department of Correction and the Departmentof Health and Human Services shall make available to a local law enforcement agency having jurisdiction all information

that the Department of Correction and the Department of Health and Human Services have concerning the sex offender, including information on risk factors in the sex offender's history.

(e)(1) A local law enforcement agency having jurisdiction that decides to disclose information under this section shall make a good faith effort to conceal the identity of the victim or victims of the sex offender's offense.

(2) Except as provided in subsection (j) of this section, information under this section is not subject to disclosure under the Freedom of Information Act of 1967, § 25-19-101 et seq.

(f) A local enforcement agency having jurisdiction may continue to disclose information on a sex offender under this section for as long as the sex offender is required to be registered under this subchapter.

(g)(1) The State Board of Education, the Arkansas Higher Education Coordinating Board of the Department of Higher Education, and the State Board of Workforce Education and Career Opportunities shall promulgate guidelines for the disclosure to students and parents of information regarding a sex offender when such information is released to a local school district or institution of higher education or vocational training by a local law enforcement agency having jurisdiction.

(2) In accordance with guidelines promulgated by the State Board of Education, the board of directors of a local school district or institution of higher education or vocational training shall adopt a written policy regarding the distribution to students and parents of information regarding a sex offender.

(h) Nothing in this section shall prevent a law enforcement officer from notifying members of the public about a person who may pose a danger to the public for a reason that is not enumerated in this subchapter.

(i) The medical records or treatment evaluations of a sex offender or sexually violent predator are not subject to disclosure under the Freedom of Information Act of 1967, § 25-19-101 et seq.

(j)(1)(A) The following information concerning a registered sex offender who is classified as a level 3 or level 4 offender by the Sex Offender Screening and Risk Assessment shall be made public:

(i) The sex offender's complete name, as well as any aliases;

(ii) The sex offender's date of birth;

(iii) The sexual offense or offenses to which the sex offender has pleaded guilty or nolo contendere or of which the sex offender has been found guilty by a court of competent jurisdiction;

(iv) The street name and block number, county, city, and zip code where the sex offender resides;

(v) The sex offender's race and gender;

(vi) The date of the last address verification of the sex offender provided to the center;

(vii) The most recent photograph of the sex offender that has been submitted to the center; and

(viii) The sex offender's parole or probation office.

(B) The center shall prepare and place the information in subdivision (j)(1)(A) of this section on the Internet home page of the State of Arkansas.

(2) The center may promulgate any rules necessary to implement and administer this subsection.

(k) Nothing in this subchapter shall be interpreted to prohibit the posting on the Internet or by other appropriate means of offender fact sheets for those sex offenders who are determined to be:

(1) High-risk or sexually violent predators, risk level 3 and level 4; or

(2) In noncompliance with the requirements of registration under rules and regulations promulgated by the Sex Offender Assessment Committee.

Acts of 1997, Act 989, § 13; Acts of 1999, Act 1353, § 8, eff. Sept. 1, 1999; Acts of 2001, Act 1743, § 10, eff. Aug. 13, 2001; Acts of 2003, Act 330, §§ 1, 2, eff. July 16, 2003; Acts of 2003 (2nd Ex. Sess.), Act 21, § 6, eff. June 3, 2004; Acts of 2005, Act 1962, § 35, eff. Aug. 12, 2005.

ARK. CODE ANN. § 12-12-917. Evaluation protocol--examiners

(a)(1) The Sex Offender Assessment Committee shall develop an evaluation protocol for preparing reports to assist courts in making determinations whether or not a person adjudicated guilty of a sex offense should be considered a sexually violent predator for purposes of this subchapter.

(2) The committee shall also establish qualifications for examiners and qualify examiners to prepare reports in accordance with the evaluation protocol.

(b)(1) The committee shall cause an assessment to be conducted on a case-by-case basis of the public risk posed by a sex offender or sexually violent predator:

(A) Who is required to register under § 12-12-905 after August 1, 1997; and

(B) For whom the Arkansas Crime Information Center has no record of an assessment's being done and a risk level established subsequent to August 1, 1997.

(2)(A)(i) An adult offender convicted of an offense described in 42 U.S.C. § 14071 et seq., as it existed on March 1, 2003, or § 12-12-903(12) shall be assessed.

(ii)(a) Subject to subdivision (c)(1) of this section, the prosecuting attorney and any law enforcement agency shall furnish the file relating to the offender to Sex Offender Screening and Risk Assessment at the Department of Correction within thirty (30) days of an offender's adjudication of guilt.

(b)(1) The prosecuting attorney shall make a copy of any relevant records concerning the offender and shall forward the copied relevant records to Sex Offender Screening and Risk Assessment within thirty (30) days of the adjudication.

(2) The relevant records include, but are not limited to:

(A) Arrest reports;

(B) Incident reports;

(C) Offender statements;

(D) Judgment and disposition forms;

(E) Medical records;

(F) Witness statements; and

(G) Any record considered relevant by the prosecuting attorney.

(B) A sex offender sentenced to life, life without parole, or death shall be assessed only if the sex offender is being considered for release through clemency.

(3) A sex offender currently in the state who has not been assessed and classified shall be identified by the center.

(4)(A) If a sex offender fails to appear for assessment, is aggressive, threatening, or disruptive to the point that Sex Offender Screening and Risk Assessment staff cannot proceed with the assessment process, or voluntarily terminates the assessment process after having been advised of the potential consequences:

(i) The sex offender shall be classified in risk level 3 or referred to the Sex Offender Assessment Committee as a risk level 4; and

(ii) The parole or probation officer, if applicable, shall be notified.

(B) A sex offender has immunity for a statement made by him or her in the course of assessment with respect to prior conduct under the immunity provisions of § 16-43-601 et seq.

(C) Assessment personnel shall report ongoing child maltreatment as required under the Arkansas Child Maltreatment Act, § 12-12-501 et seq.

c)(1) To the extent permissible and under the procedures established by state and federal regulations, public agencies shall provide the committee access to all relevant records and information in the possession of public agencies or any private entity contracting with a public agency relating to the sex offender or sexually violent predator under review.

(2) The records and information include, but are not limited to:

(A) Police reports;

(B) Statements of probable cause;

(C) Presentence investigations and reports;

(D) Complete judgments and sentences;

(E) Current classification referrals;

(F) Criminal history summaries;

(G) Violation and disciplinary reports;

(H) All psychological evaluations and psychiatric hospital reports;

(I) Sex offender or sexually violent predator treatment program reports;

(J) Juvenile court records;

(K) Victim impact statements;

(L) Investigation reports to the child abuse hotline, the Division of Children and Family Services of the Department of Health and Human Services, and any entity contracting with the Department of Health and Human Services for investigation or treatment of sexual or physical abuse or domestic violence; and

(M) Statements of medical providers treating victims of sex offenses indicating the extent of injury to the victim.

(d)(1)(A) Records and information obtained under this section shall not be subject to the Freedom of Information Act of 1967, § 25-19-101 et seq., unless otherwise authorized by law.

(2)(A)(i) The sex offender or sexually violent predator shall have access to records and information generated and maintained by the committee.

(ii) These records shall include any reports of the assessment and the tape of the interview but do not include restricted

source documents of commercial psychological tests or working notes of staff.

(B)(i) Unless otherwise ordered by a court of competent jurisdiction, records and information generated by other agencies and obtained under this section shall not be available to the sex offender or sexually violent predator except through the agency or individual having primary custody of the records.

(ii) Upon request, the sex offender shall be given a list of the records or information obtained.

(C) If the record or information generated contains the address of a victim or a person who has made a statement adverse to the sex offender or sexually violent predator, the address shall be redacted and the sex offender or sexually violent predator shall have access to records and information other than the identity and address.

(e) In classifying the sex offender into a risk level for the purposes of public notification under § 12-12-913, the committee, through its staff, shall review each sex offender or sexually violent predator under its authority:

(1) Prior to the sex offender's release for confinement in a correctional facility;

(2) Prior to the release of a person who has been committed following an acquittal on the grounds of mental disease or defect;

(3) At the start of a sex offender's suspended imposition of sentence; or

(4) At the start of a sex offender's probation period.

(f)(1)(A) The committee shall issue the offender fact sheet to the local law enforcement agency having jurisdiction.

(B) The offender fact sheet is provided to assist the local law enforcement agency having jurisdiction in its task of community notification.

(2) The committee shall provide the Parol [FN1] Board with copies of the offender fact sheet on inmates of the Department of Correction.

(3) The committee shall provide the Department of Community Correction with copies of the offender fact sheet on any sex offender under the Department of Community Correction's supervision.

(4)(A)(i) The offender fact sheet shall be prepared on a standard form for ease of transmission and communication.

(ii) The offender fact sheet shall also be on an Internet-based application accessible to law enforcement, state boards, and licensing agencies.

(iii) The offender fact sheet of a sexually violent predator and a sex offender found by the center to be in violation of the registration requirement shall be made available to the general public unless the release of the offender fact sheet, in the opinion of the committee based on a risk assessment, places an innocent individual at risk.

(B) The standard form shall include, but not be limited to:

(i) Registration information as required in § 12-12-908;

(ii) Risk level;

(iii) Date of deoxyribonucleic acid (DNA) sample;

(iv) Psychological factors likely to affect sexual control;

(v) Victim age and gender preference;

(vi) Treatment history and recommendations; and.

(vii) Other relevant information deemed necessary by the committee or by professional staff performing sex offender assessments.

(5)(A) The committee shall ensure that the notice is complete in its entirety.

(B) A law enforcement officer shall notify the center if a sex offender has moved or is otherwise in violation of a registration requirement.

(6)(A) All material used in the assessment shall be kept on file in its original form for one (1) year.

(B) After one (1) year the file may be stored electronically.

(g)(1) In cooperation with the committee, the Department of Correction shall promulgate rules and regulations to establish the review process for assessment determinations.

(2)(A) The sex offender or sexually violent predator may request an administrative review of the assigned risk level under the conditions stated and following the procedures indicated under § 12-12-922.

(B) The sex offender shall be notified of these rights and procedures in the documentation sent with the notification of risk level.

(h)(1)(A) A sex offender or sexually violent predator may request the committee to reassess the sex offender's assigned risk level after five (5) years have elapsed since initial risk assessment by the committee and may renew that request one (1) time every five (5) years.

(B) In the request for reassessment, the sex offender shall list the facts and circumstances that demonstrate that the sex offender no longer poses the same degree of risk to the community.

(2) The committee shall also take into consideration any subsequent criminal act by the sex offender or sexually violent predator who has requested reassessment.

Acts of 1997, Act 989, § 17; Acts of 1999, Act 1353, §§ 10, 11, eff. Sept. 1, 1999; Acts of 2001, Act 1743, § 12, eff. Aug. 13, 2001; Acts of 2003 (2nd Ex. Sess.), Act 21, § 8, eff. June 3, 2004; Acts of 2005, Act 1962, §§ 36, 37, eff. Aug. 12, 2005; Acts of 2006 (1st Ex. Sess.), Act 4, § 5, eff. April 7, 2006

ARK. CODE ANN. § 12-12-922. Alternative procedure for sexually violent predator evaluations

(a)(1) The alternative procedure under this section may be used for sexually violent predator evaluations if information that was not available to the court at the time of trial emerges in the course of a sex offender evaluation.

(2)(A) Examiners qualified by the Sex Offender Assessment Committee shall include in the assessment of any sex offender convicted of a sex offense a review as to whether the frequency, repetition over time, severity of trauma to the victim, or established pattern of predatory behaviors suggests that the sex offender suffers from a mental abnormality or personality disorder that makes the sex offender likely to engage in future predatory sexual offenses.

(B) If a mental abnormality or personality disorder is suspected, a licensed psychologist or psychiatrist qualified by the committee shall conduct further assessment to determine the presence or absence of a mental abnormality or personality disorder.

(C) The report of the assessment shall be presented to the committee, which shall make the determination of a mental abnormality or personality disorder according to protocols established by the committee and published in the committee guidelines.

(b)(1)(A) A sex offender may challenge an assigned risk level by submitting a written request for an administrative review.

(B) As part of the request for an administrative review, the sex offender may request in writing copies of all documents generated by the examiners, a listing by document name and

source of all documents that may be available from other agencies having custody of those documents, and a copy of the tape of the interview.

(2) The request for an administrative review shall be made in accordance with instructions provided on the risk level notification and within fifteen (15) days of receipt of the advisement of risk level notification to the sex offender by certified mail.

(3)(A) The basis of the request for administrative review shall be clearly stated and any documentary evidence attached.

(B) The basis for administrative review is:

(i) The rules and procedures were not properly followed in reaching a decision on the risk level of the sex offender;

(ii) Documents or information not available at the time of assessment have a bearing on the risk that the sex offender poses to the community; or

(iii) The assessment is not supported by substantial evidence.

(4) Unless a request for an administrative review is received by the committee within twenty (20) days of receipt of the advisement of risk level notification by the sex offender sent by certified mail or delivered by personal service, an offender fact sheet shall be made available to law enforcement so that community notification may commence.

(5) If a request for an administrative review is received by the committee, law enforcement may make community notification only at the level immediately below the level upon which review has been requested.

(6)(A) A member of the committee shall conduct the review and respond within thirty (30) days of receiving a request for an administrative review.

(B) If additional time is needed to obtain facts, the committee shall notify the sex offender requesting the review.

(7)(A)(i) The findings of the administrative review shall be sent to the sex offender by certified mail. Community notification shall commence five (5) calendar days after the postmark of the advisement of the findings of the administrative review.

(ii) Upon receipt of the findings, the sex offender has thirty (30) days to file a petition under the Arkansas Administrative Procedure Act, § 25-15-201 et seq., for judicial review in the Pulaski County Circuit Court or in the circuit court of the county where the sex offender resides or does business.

(B) The circuit court shall refuse to hear any appeal of an assigned risk level by a sex offender unless the circuit court finds that the administrative remedies available to the sex offender under this subsection have been exhausted.

(8)(A)(i) A copy of the petition for judicial review shall be served on the executive secretary of the committee inaccordance with the Arkansas Rules of Civil Procedure.

(ii) When the petition for judicial review has been served on the executive secretary of the committee, a record of the committee's findings and copies of all records in its possession shall be furnished by the committee to the circuit court within thirty (30) days of service.

(B) The committee may ask the circuit court to seal statements of victims, medical records, and other items that could place third parties at risk of harm.

(9) A ruling by the circuit court on the petition for judicial review is considered a final judgment.

Acts of 2003 (2nd Ex. Sess.), Act 21, § 12, eff. June 3, 2004; Acts of 2005, Act 1962, § 39, eff. Aug. 12, 2005; Acts of 2006 (1st Ex. Sess.), Act 4, § 6, eff. April 7, 2006.

ARK. CODE ANN. § 5-14-128. Registered sex offenders prohibited from living near schools or day cares

(a) It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand feet (2,000') of the property on which any public or private elementary or secondary school or daycare facility is located.

(b)(1) It is not a violation of this section if the property on which the sex offender resides is owned and occupied by the sex offender and was purchased prior to the date on which the public or private elementary or secondary school or daycare facility was established.

(2) The exclusion in subsection (b)(1) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after the public or private elementary or secondary school or daycare facility is established.

(c)(1) It is not a violation of this section if the sex offender resides on property he or she owns prior to July 16, 2003.

(2) The exclusion in subsection (c)(1) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after July 16, 2003.

(d) A sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who knowingly violates a provision of this section is guilty of a Class D felony.

Acts of 2003, Act 330, § 3, eff. July 16, 2003.

***Sex and Child Offender Guidelines and Procedures*, Code Ark. R 004 00 002 at 8 (2002) (reproduced in part)**

RISK ASSESSMENT, ADULT

Assessments of adult offender risk will be based on actuarial analyses, information obtained from interview, psychological testing and evaluation, review of relevant records and historical data, and polygraph or penile plethysmograph, if deemed necessary by the team conducting the evaluation.

Sex and Child Offender Guidelines and Procedures, Code Ark. R. 004 00 002 at 14 (2002) (reproduced in part)

LEVEL OF RISK FOR ADULT AND JUVENILE OFFENDERS

Based on historical data and information obtained from the risk assessment process, offenders are assigned to the following levels of risk to the general public:

1. **Low risk:** Usually these are individuals with no prior history of sexual acting out, and no strong antisocial tendencies, sexual compulsions or psychological factors impairing judgement.

2. **Moderate risk:** Usually these are individuals with limited or circumscribed prior history of sexual acting out, possess some antisocial personality characteristics, predatory tendencies, or deviant sexual interest or behavioral patterns that increase the general level of risk these offenders pose. They may have mild or well controlled mental disorders, and / or developmental disabilities.

3. **High risk:** These individuals usually have histories of repeat sexual offending, and/or strong antisocial, violent or predatory personality characteristics. Sexual compulsions are likely to be present, but may be kept under control when relapse prevention plans are followed and treatment is continued. The offense patterns of these individuals reflect a relatively high probability of re-offense and/or a risk of substantial injury to victims should re-offense occur.

4. **Sexually Violent Predator:** These are individuals with impaired judgment or control who have sexual or violent compulsions that they lack the ability to control. This may be

due to pedophilia or other disorder of sexual attraction, mental illness or personality disorder that distorts thinking, interferes with behavioral control, and predisposes the person to acts of predatory sexual violence.